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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 490

FRANK L. YOUNG COMPANY, PETITIONER,

vs.

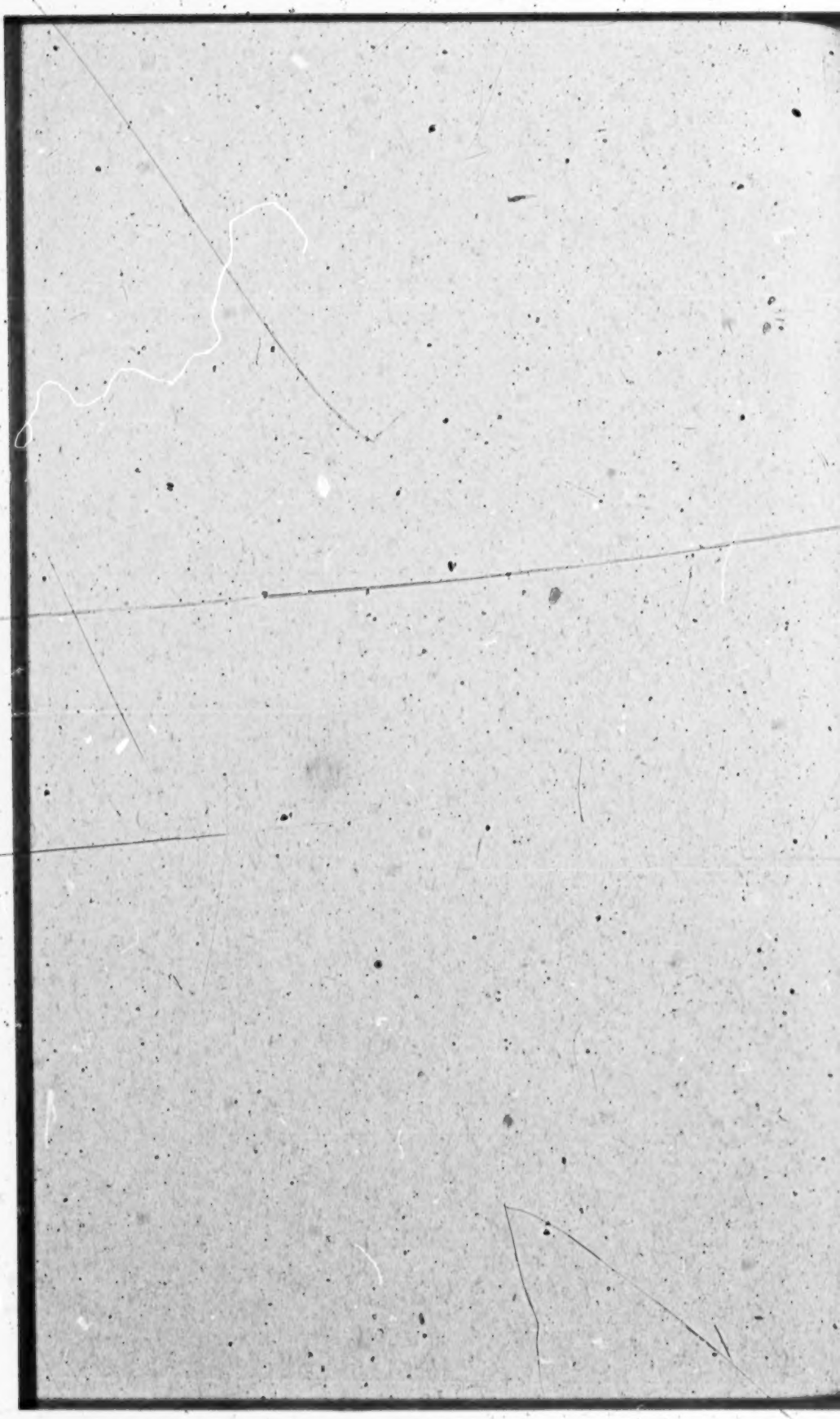
McNEAL EDWARDS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 29, 1930

CERTIORARI GRANTED NOVEMBER 24, 1930

(35,412)



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IN UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

No. 3021. Law

FRANK L. YOUNG COMPANY, Plaintiff,

v.

MCNEAL-EDWARDS COMPANY, Defendant

MOTION FOR SPECIAL PRECEPT—Filed and allowed February 21, 1927

The plaintiff says that no attachment by trustee process, or otherwise, has been made on the goods, effects or credits of the defendant corporation; wherefore it moves/petitions that a special precept issue in the amount of $10,000, returnable —— —, 1927.

By Its Attorneys, Warner, Stackpole & Bradlee.
W. B. L.

[fol. 2] Allowed February 23, 1927. J. A. L., D. J.

IN UNITED STATES DISTRICT COURT

SPECIAL PRECEPT—Feb. 23, 1927

MASSACHUSETTS DISTRICT, ss:

[L. s.]

The President of the United States of America to the Marshal of our District of Massachusetts or his deputies, Greeting:

Whereas in an action pending in the District Court of the United States, for the District of Massachusetts, between the Frank L. Young Company, a corporation organized and existing under the laws of the Commonwealth of Massachusetts, having its usual place of business in Boston, in said District, plaintiff, and the McNeal-Edwards Company,

a corporation organized and existing under the laws of the Commonwealth of Virginia, and a citizen and resident of said Commonwealth, having its usual place of business at Reedville therein, defendant.

Upon motion ex parte by the plaintiff the court has ordered that a special precept issue for the purpose of attaching the goods, effects or credits of the McNeal-Edwards Company, defendant herein, and that you summon McNeal-Edwards Company, defendant herein, to appear and answer to the plaintiff in said action.

We command you, therefore, to attach the goods, effects or credits of said McNeal-Edwards Company, defendant herein, to the value of ten thousand dollars ($10,000), and that you summon the said McNeal-Edwards Company, defendant (if it may be found in your district), to appear before our judges of our said court to be holden at Boston, in said District, on the third Tuesday of March next, to wit: March 15, 1927, to show cause, if any they have, why execution to be issued upon such judgment as the said plaintiff may recover against said defendant in this action (if any) should not issue against the goods, effects or credits of [fol. 3] said McNeal-Edwards Company, defendant, and make return of this writ on or before said third Tuesday of March next, with your doings therein.

Witness, the Honorable James M. Morton, Jr., at Boston, this twenty-third day of February, in the year of our Lord one thousand nine hundred and twenty-seven.

John E. Gilman, Jr., Deputy Clerk.

IN UNITED STATES DISTRICT COURT

OFFICER'S RETURN ON SPECIAL PRECEPT

UNITED STATES OF AMERICA,
Massachusetts District, ss:

Boston, February 25, 1927.

Pursuant hereunto and by virtue of a special precept issued from the United States District Court at Boston, Mass., said district, I this day attached eleven hundred steel drums at 888 East First Street, South Boston, Mass.,

said district, as the property of the within-named McNeal-Edwards Company, defendant, and afterwards on the same day I deposited a true and attested copy of this precept in the city clerk's office, city of Boston and district of Massachusetts, and afterwards on the twenty-sixth day of February, 1927, I summoned the within-named McNeal-Edwards Company to appear at court as within directed by delivering in hand at Boston, Mass., said district, to Asa P. French, Esq., attorney of record for the within-named McNeal-Edwards Company, a true and attested copy of this precept.

William J. Keville, U. S. Marshal, by James Fraser, Deputy.

Service $4, travel .24, paid City Clerk .25—$4.49.

The writ in this cause is dated January 4, 1927, and was entered late by order of court on March 22, 1927, and is as follows:

[fol. 4] IN UNITED STATES DISTRICT COURT

WRIT AND RETURN

MASSACHUSETTS DISTRICT, ss:

[SEAL.]

The President of the United States of America to the Marshal of our District of Massachusetts or his deputy, Greeting:

We command you to attach the goods or estate of McNeal-Edwards Company, a corporation organized and existing under the laws of the Commonwealth of Virginia and a citizen and resident of said Commonwealth, having its usual place of business at Reedville therein; which corporation cannot be found to be served with process; which corporation has brought an action, wherein Asa P. French is attorney of record for the plaintiff, in the District Court for our District of Massachusetts; in which action the demands are of such a nature that the judgment or execution therein may be set off against the judgment or execution herein;

to the value of twenty thousand dollars, and for want thereof to summon the said McNeal-Edwards Company (if it may be found in your district), to appear before our Judge of our District Court, next to be holden at Boston, within and for our said District of Massachusetts, on the third Tuesday of March, 1927, then and there, in our said Court, to answer unto Frank L. Young Company, a corporation organized and existing under the laws of the Commonwealth of Massachusetts and a citizen and resident of said Commonwealth, having its usual place of business in Boston therein; said summons to be made by serving this Writ on Asa P. French who has a usual place of business in Boston in the County of Suffolk and Commonwealth of Massachusetts, as said French is attorney of Record as aforesaid; in an action of contract to the damage of the said Frank L. Young Company (as it says) the sum of twenty thousand dollars, which shall then and there be made to appear, with other due damages. And have you there this Writ, with your doings therein.

Witness, the Honorable James M. Morton, Jr., at Boston, the fourth day of January, in the year of our Lord one thousand nine hundred and twenty-seven.

James S. Allen, Clerk.

[fol. 5] Officer's Return on Writ

United States of America,
Massachusetts District, ss:

Boston, January 5, 1927.

Pursuant hereto I have this day attached a chip as the property of the within named McNeal-Edwards Company, and thereafter on the same day I summoned the within named McNeal-Edwards Company to appear at Court as within directed by giving in hand to Asa P. French, attorney of record of said McNeal-Edwards Company, at Boston, in said District, copy of an original summons of this writ.

William J. Keville, U. S. Marshal, by Thomas J. Pyne, Deputy.

Service $2; travel, .06—$2.06.

In United States District Court

Declaration—Filed March 22, 1927

Plaintiff says that it is a corporation organized and existing under the laws of the Commonwealth of Massachusetts

and is a citizen of said Commonwealth; that the defendant company is a corporation organized and existing under the laws of the Commonwealth of Virginia and is a citizen of said Commonwealth, and that the matter in controversy, exclusive of interest and costs, exceeds three thousand dollars ($3,000). Plaintiff further says that an action was brought by the defendant company against the plaintiff company in this Court and is now pending, and that the number of said action is Law 2071; that the defendant company is not an inhabitant of this Commonwealth and cannot be found in this district to be served with process; that the demands in the present action and in the said former action are of such a nature that the judgment or execution in the one case may be set off against the judgment or execution in the other, and that the demands rise out of the same transaction; that Asa P. French was and is the attorney of record for the plaintiff in the said former action.

[fol. 6] Count 1. Plaintiff says that on or about January 3, 1922 the plaintiff was engaged in the business of refining Prime "A" Crude Menhaden Fish Oil and producing therefrom pressed fish oil; that on or about said date the defendant sold or contracted to sell to the plaintiff and the plaintiff bought or agreed to buy by description, 1,000 to 1,200 barrels of Prime "A" Crude Menhaden Fish Oil at 33 cents per gallon in sellers' drums F. O. B. Baltimore which oil on last analysis showed about four percent free fatty acid. Plaintiff says that pursuant to the aforesaid contract, the defendant delivered 1,107 barrels of oil to the plaintiff, but that the oil so delivered was not Prime "A" Crude Menhaden Fish Oil but an oil of another and inferior grade and of a much lower market value, and the aforesaid oil in no way complied with the warranties in the aforesaid contract. And the plaintiff says that it has done all things required by it to be done under the said contract, and that it gave to the defendant notice of the failure of said oil to comply with the said warranties, within a reasonable time. And the plaintiff says that due to the failure of said oil to comply with the warranties of the contract, it was unable for a long time to remove the said oil from the barrels, that it was put to great expense and inconvenience by being obliged to store the aforesaid oil and barrels; that it was put to greatly increased expense in processing the said oil; that the processed product of this oil was of a greatly in-

ferior grade and of much less market value than the processed product of oil complying with the warranties of the contract would have been; and that it was otherwise damaged to the extent alleged in its writ.

Count 2. The plaintiff says that on or about January 3, 1922, it was engaged in the business of pressing fish oil and contracted with the defendant, all as more particularly alleged in Count 1; that the said fish oil was bought by description; that the defendant is a dealer in goods of that description; and that there was an implied warranty by the defendant of the merchantability of said oil. But that the said oil was not merchantable. And the plaintiff says that it has performed its part of said contract, has given notice [fol. 7] of the breach of warranty to the defendant, and has been greatly damaged, all as more particularly alleged in Count 1.

Count 3. The plaintiff says that on or about January 3, 1922, it was engaged in the business of pressing fish oil and contracted with the defendant, as more particularly alleged in Count 1; that the plaintiff made known to the defendant the particular purpose for which this oil was required and relied upon the defendant's skill and judgment; and that there was an implied warranty by the defendant that the goods should be reasonably fit for the purpose for which they were required by the plaintiff. But the said oil was not reasonably fit for such purpose. And the plaintiff says that it has complied with its duties under the said contract, that it has given notice of the breach of warranty to the defendant, and that by the breach of warranty the defendant has been damaged, all as more particularly alleged in Count 1.

By its Attorneys, Warner, Stackpole & Bradlee, W. B. Leach, Jr.

IN UNITED STATES DISTRICT COURT.

MOTION TO DISMISS—Filed March 24, 1927

Now comes the defendant in the above entitled action and, appearing specially, moves the court to dismiss the same on the ground that the defendant is not a citizen or

resident of the Commonwealth of Massachusetts, but was at the time of the beginning of this suit, and is, a citizen and resident of the Commonwealth of Virginia, and that no valid service has been made upon the defendant, as appears upon the face of the writ and the declaration in said action, and as disclosed by the records of this court in case No. 2054 Law, Frank L. Young Company v. McNeal-Edwards Company, and case No. 2071 Law, McNeal-Edwards Company v. Frank L. Young Company, a copy of the declaration in each of which is hereby annexed marked "A" and "B" respectively.

By Its Attorney, Asa P. French.

[fol. 8] EXHIBIT "A" TO MOTION TO DISMISS

FRANK L. YOUNG COMPANY

v.

THE MCNEAL-EDWARDS COMPANY

Plaintiff's Declaration

Count 1. And the plaintiff says that on or about January 3, 1922, the defendant contracted to sell to the plaintiff and the plaintiff agreed to buy one thousand (1,000) to twelve hundred (1,200) barrels of Prime A Crude Manhaden Fish Oil at thirty-three cents (33c) per gallon in seller's drums delivered in Baltimore. And the plaintiff further says that pursuant to the aforesaid contract the defendant in fact delivered one thousand one hundred and seven (1,107) barrels of oil to the plaintiff; but that the oil so delivered was not "Prime A Crude Manhaden Fish Oil" but an oil of another and inferior grade, and of a much lower market value, and the aforesaid oil in no way complied with the warranties in the aforesaid contract. And the plaintiff says that due to the inferior grade of the oil so delivered it was unable for a long time to remove the same from the aforesaid barrels, was put to great expense and inconvenience by being obliged to store the aforesaid oil and barrels; was unable to meet the demands of its customers, lost the profit which it might have made had this oil been in accordance with the specifications of the contract, and was

otherwise injured, all to the plaintiff's great damage, for the recovery of which damage the plaintiff brings this action.

By Its Attorneys, Warner, Stackpole & Bradlee.

EXHIBIT "B" TO MOTION TO DISMISS

McNEAL-EDWARDS COMPANY

v.

FRANK L. YOUNG COMPANY

Plaintiff's Declaration

First Count (in contract). And the plaintiff says that on or about the third day of January, 1922, it sold to the defendant eleven hundred and seven (1107) barrels of Prime "A" Crude Menhaden Fish Oil, and shipped the same from its plant in Reedville, Virginia, to the defendant at Boston, [fol. 9] in containers known to the trade as drums; that it was a part of the defendant's obligation under the contract for said sale forthwith to remove the oil from said drums and to return the latter, freight prepaid, to the plaintiff at said Reedville; but the plaintiff has refused and neglected and still refuses and neglects to return said drums to the plaintiff as aforesaid to the great damage of the plaintiff as set forth in its writ.

Second Count (in tort). And the plaintiff says that on or about the twenty-third day of July, 1922, the defendant wrongfully converted to its own use eleven hundred and seven (1107) containers or drums of the value of three dollars and fifty cents ($3.50) each, belonging to the plaintiff, to the plaintiff's great damage as set forth in its writ.

McNeal-Edwards Company, by Its Attorneys, Asa P. French, Jonathan W. French. Clarence S. Towles, of Counsel.

Also on said twenty-fourth day of March, a plea in abatement was filed, said plea being subsequently amended on April 4, 1927, and as amended being as follows:

IN UNITED STATES DISTRICT COURT

DEFENDANT'S PLEA IN ABATEMENT AS AMENDED—Filed March 24, 1927

Now comes the defendant, McNeal-Edwards Company, and, without waiving its special appearance, but relying thereon, and without submitting itself to the jurisdiction of the court, says that it ought not to be held to answer, or to proceed further, in this suit for the following reasons:

(1) That on the date of the bringing of this action, to wit, January 4, 1927, there was pending in this court another suit, No. 2054 Law, between the same parties for the same cause of action, which suit was discontinued, without notice to this defendant, on February 28, 1927.

(2) That in January, 1922, the defendant, a corporate citizen and resident of Virginia, having no place of business [fol. 10] in Massachusetts, sold and shipped to the plaintiff, Frank L. Young Company, a Massachusetts corporation, a quantity of crude Menhaden oil. The plaintiff paid for the oil in accordance with the terms of the contract and, subsequently, in or about October, 1922, brought suit against this defendant, in the Superior Court for Suffolk County, Massachusetts, predicating jurisdiction in that court solely upon an attachment made by it of the containers, 1107 in number, then in its possession, in which the oil was shipped. McNeal-Edwards Company thereupon removed the suit so restricted to this court, entered a special limited appearance, and filed an answer a copy of which is hereto annexed marked "A". Shortly thereafter it brought a cross-action in this court to recover the value of the containers, alleged in the declaration to be $3,874.50.

These two suits have, for various reasons, not been brought to trial, and, on or about January 4, 1927, without discontinuing its original action, Frank L. Young Company brought suit in this court for the same cause of action as that alleged in the original suit, and seeks thereby to obtain unrestricted venue not limited to the value of said containers.

Process of the present suit was served upon plaintiff's attorney in the cross-action to the original suit.

And the defendant says that such service, under the circumstances heretofore alleged, cannot operate to give the

plaintiff the right to satisfy a judgment, if any, against any property of the defendant except said containers, but for the presence of which in Massachusetts it would have been obliged to bring its original action in Virginia.

And the defendant further says that the service attempted to be made upon it in this case is void and of no effect, for the reason that a party bringing suit against a non-resident in a state court, and then claiming jurisdiction upon the sole ground that the defendant in such suit has property in this Commonwealth which can be attached, cannot, if the suit is removed to the Federal Court, and a cross-action is instituted there, bring another suit, with or without discontinuing the original suit, for the same cause [fol. 11] of action, and thereby vest unrestricted jurisdiction in the Federal Court, by serving process therein upon the attorney for the plaintiff in such cross-action.

By Its Attorney, Asa P. French, Appearing Specially.

March 23, 1927.

Then personnally appeared the above-named Asa P. French and made oath that the facts alleged in the foregoing plea in abatement are true, before me,

George W. Aberle, Notary Public. (Seal.)

I, Asa P. French, attorney for the defendant, appearing specially, certify that the above plea in abatement is interposed in good faith and not for the purpose of delay.

Asa P. French.

EXHIBIT "A" TO PLEA IN ABATEMENT

DISTRICT COURT OF THE UNITED STATES DISTRICT OF MASSACHUSETTS

Law. No. 2054

FRANK L. YOUNG COMPANY

v.

MCNEAL-EDWARDS COMPANY

Defendant's Answer

Now comes the defendant in the above-entitled cause—without submitting its person to the jurisdiction of this

Honorable Court, but invoking such jurisdiction only for the purpose of protecting its property seized on attachment in the State court from which this suit has been removed—and denies each and every allegation in the plaintiff's writ and declaration contained.

By Its Attorney, Asa P. French. Clarence S. Towles, Reedville, Virginia, of Counsel.

[fol. 12] IN UNITED STATES DISTRICT COURT

REPLICATION TO PLEA IN ABATEMENT—Filed April 11, 1927

Now comes the plaintiff and replying to the defendant's plea in abatement as amended and says:

1. That there was pending on January 4, 1927, another suit between the same parties for the same cause of action numbered 2054 Law on the docket of this court; that no personal jurisdiction was obtained over the defendant in that action and that no judgment could have been given in that action, except that the property attached in that action be sold and the plaintiff satisfied as far as possible from such property; that the McNeal-Edwards Company commenced against the Frank L. Young Company an action in this court growing out of the same transaction as the plaintiff's said action, and that McNeal-Edwards Company obtained personal jurisdiction over Frank L. Young Company, in that action; for the purpose of curing the defect of personal jurisdiction in the plaintiff's former action, and for the purpose of putting the parties on an equal footing so that the controversies between them might be finally adjudicated, the present action was brought and personal jurisdiction obtained by service on the attorney of record in the McNeal-Edwards Company's said action under General Laws of Massachusetts, Chapter 227, Sections 2 and 3, and Rule 53 of this court.

By Its Attorneys, Warner, Stackpole & Bradlee, W. B. Leach, Jr.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

April 11, 1927.

Then personally appeared the above-named W. B. Leach, Jr., and took oath that the facts stated by him in the above replication are true.

Before me,

Foster E. Allison, Notary Public. (Seal.)

IN UNITED STATES DISTRICT COURT

MINUTE ENTRY OF HEARING

On the said eleventh day of April, this cause came on to [fol. 13] be heard on the defendant's motion to dismiss, the Honorable James A. Lowell, District Judge, sitting, and after due consideration thereon had, a memorandum of the court was filed,—denying the motion to dismiss.

IN UNITED STATES DISTRICT COURT

ANSWER—Filed April 22, 1927

Now comes the defendant in the above-entitled cause and, without waiving its motion to dismiss and its plea in abatement, as amended, filed therein, denies each and every allegation in the plaintiff's writ and declaration contained.

And further answering the defendant says that the oil which was furnished by the plaintiff to the defendant, and is referred to in the plaintiff's declaration, was of the quality and description which the plaintiff ordered and the defendant agreed to furnish.

And further answering the defendant says that, with respect to the quality and description of the oil which it sold to the plaintiff, the plaintiff is bound under the contract by the gauging and analysis made by George L. Thompson and Gascoyne & Company, or either of them, who were designated by the plaintiff as its agents and representatives for that purpose.

And the defendant further says that the plaintiff, before action brought, accepted the discount provided by the contract in case of excess of free fatty acids, and has adjusted

its claim against the defendant by deducting such discount, and paying the defendant the difference between that amount and the purchase price.

By Its Attorney, Asa P. French. Clarence S. Towles, of Counsel.

IN UNITED STATES DISTRICT COURT

MINUTE ENTRIES

On the twenty-sixth day of said April, a further memorandum of the court was filed, overruling the plea in abatement.

This cause was thence continued from term to term to the December Term, A. D. 1928, when, to wit, February 7, 1928, issue being joined, a jury was duly empanelled and [fol. 14] sworn according to law to try the issue, the Honorable James M. Morton, Jr., District Judge, sitting.

Said cause thereupon came on to be heard on the seventh, eighth, ninth and tenth days of February, A. D. 1928, together with case No. 2071 Law, McLean-Edwards Co. v. Frank L. Young Co. et al.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S MOTION THAT A VERDICT BE DIRECTED IN ITS BEHALF—Filed February 10, 1928

And now comes the defendant in the above-entitled cause and, at the close of all the evidence, moves the court to direct the jury to return a verdict for the defendant.

McNeal-Edwards Company, by Its Attorney Asa P. French.

IN UNITED STATES DISTRICT COURT

ALTERNATIVE VERDICT—February 10, 1928

The jury find for the plaintiff and assess damages in the sum of ten thousand seven hundred thirty and 17/100 dollars;

But if, as a matter of law, the plaintiff is not entitled to a verdict, then the jury find for the defendant and consent that this alternative verdict may be entered on order of the United States District Court for the District of Massachusetts, or of the United States Circuit Court of Appeals for the First Circuit, or of the Supreme Court of the United States, with the same effect as if returned by them.

Harles Bailey, Foreman.

[fol. 15] IN UNITED STATES DISTRICT COURT

SPECIAL FINDINGS—Feb. 10, 1928

The following special questions are put to the jury and answered by them as follows:

1. Was the oil delivered by the McNeal-Edwards Company to the Frank L. Young Company of the quality and grade called for by the contract sued upon?

The jury answer: No.

2. If not, what is the amount of the damages sustained by the Frank L. Young Company by reason of inferiority in the quality or grade of the oil delivered?

The jury answer: $10,730.17.

Charles Bailey, Foreman.

IN UNITED STATES DISTRICT COURT

MOTION IN ARREST OF JUDGMENT—Filed February 14, 1928

Now comes the defendant in the above-entitled cause, after verdict and, appearing specially, moves that judgment therein be arrested on the grounds—

(1) That it appears upon the record that this court has never acquired jurisdiction of this defendant;

(2) That it appears upon the record that the service made upon the defendant's attorney was void and of no effect;

(3) That it appears upon the record that the District of Massachusetts is not the proper venue for hearing and determining said cause; and

(4) That the alternate or conditional verdict rendered by the jury, at the request or direction of the court, was a violation of the defendant's right to that trial by jury secured to it by the Seventh Amendment to the Constitution of the United States.

McNeal-Edwards Company, by Its Attorney, Asa P. French, Appearing Specially.

[fol. 16] April 9, 1928.—Motion denied. Exception saved. J. M. M., Jr.

This cause was thence continued to the March Term, A. D. 1928, when, to wit, April 9, 1928, the aforementioned motion in arrest of judgment was denied, exception being saved.

On the ninth day of April, A. D. 1928, a draft bill of exceptions was filed by the defendant.

This cause was thence continued to the June Term, A. D. 1928, when, to wit, July 6, 1928, a substituted bill of exceptions was filed and allowed by the court.

IN UNITED STATES DISTRICT COURT

AGREEMENT FOR JUDGMENT—Filed November 27, 1928

In the above-entitled cause it is agreed that judgment may be entered forthwith upon the verdict.

Warner, Stackpole & Bradlee, Attorneys for Plaintiff. Asa P. French, Attorney for Defendant.

IN UNITED STATES DISTRICT COURT

JUDGMENT

Thereupon, to wit, November 27, 1928, it is considered by the court that the said Frank L. Young Company, plaintiff, recover of the said McNeal-Edwards Company, defendant, the sum of ten thousand seven hundred thirty dollars and seventeen cents ($10,730.17) damages, together with interest amounting to five hundred thirteen dollars and twenty-

six cents ($513.26), and its costs of suit taxed at ninety-three dollars and forty-eight cents ($93.48).

[fol. 17] IN UNITED STATES DISTRICT COURT

Defendant's Substituted Bill of Exceptions—Filed and Allowed July 6, 1928

This is an action of contract. The writ and pleadings are made a part hereof.

STATEMENT OF FACTS

The facts material to this bill of exceptions are as follows:

In January, 1922, the defendant, a corporate citizen and resident of Virginia, having no place of business in Massachusetts, sold through a merchandise broker in Baltimore and shipped to the plaintiff, Frank L. Young Company, a Massachusetts corporation, a quantity of Menhaden oil. The plaintiff received the oil, paid for it as hereafter stated, and subsequently in or about October, 1922, brought suit for a breach of warranty in the Superior Court for Suffolk County, Massachusetts, predicating jurisdiction in that court solely upon an attachment made by it of the containers, 1,107 in number, then in its possession in which the oil had been shipped to it by the defendant. McNeal-Edwards Company thereupon removed the suit, so restricted, to this court, entered a special limited appearance and filed an answer. Shortly thereafter, on March 20, 1923, it brought an action in this court to recover the value of the containers alleged in the declaration to be $3,874.50. While these suits were pending, on or about January 4, 1927, Frank L. Young Company brought suit in this court and seeks thereby to obtain an unrestricted venue not limited to the value of said containers.

The original suit, brought in the Superior Court for Suffolk County and removed to this court, was discontinued on February 28, 1927.

Process of the present suit was served upon Asa P. French, the plaintiff's attorney in the action of McNeal-Edwards Company against Frank L. Young Company,

whereupon, on March 24, 1927, McNeal-Edwards Company filed a plea in abatement, a copy of which as amended is hereto annexed marked "B", on the ground, in substance, that such service, under the circumstances hereto alleged, did not operate to give the plaintiff a right to satisfy a judgment, if any, against any property of the defendant ex- [fol. 18] cept said containers, but for the presence of which in Massachusetts it would have been obliged to bring the original action in Virginia; and that therefore the service attempted to be made upon it (McNeal-Edwards Company) in the person of its attorney in this case was void and of no effect.

The plea in abatement was overruled by Lowell, J., and the defendant duly excepted to said ruling. Thereafter the defendant filed an answer of which a copy is hereto annexed marked "A". Thereafter, to wit, during the December, 1927, term, the two cases, Frank L. Young Company v. McNeal-Edwards Company and McNeal-Edwards Company v. Frank L. Young Company, came on trial before Morton, J., and a jury.

Copies of the docket entries in the cases of Frank L. Young Company v. The McNeal-Edwards Company, No. 2054; McNeal-Edwards Company v. Frank L. Young Company, No. 2071; and Frank L. Young Company v. McNeal-Edwards Company, No. 3021, are hereto annexed and marked "C", "D" and "E"; and copies of the plaintiff's declaration and specifications in the case of McNeal-Edwards Company v. Frank L. Young Company are annexed and marked "F" and "G".

The following is, in substance, all the testimony adduced in the trial of the case of Frank L. Young Company v. McNeal-Edwards Company, No. 3021.

The plaintiff offered in evidence

EXHIBIT 2

"Purchase Order

No. B 1002

Boston, Mass., January 5, 1922.

Frank L. Young Company, 111 Purchase Street Boston, Mass., to Reilly-Edwards Co., Address Baltimore, Md.

Ship to Frank L. Young Company at Boston, Mass.
Ship via M. & M. T. Co. When wanted: Late this month.

[fol. 19]

Quantity	Description	Price
1000 to 1200 Bbls.	Prime 'A' Crude Menhadne [sic] Fish Oil (McNeal-Ed-Co. make—guaranteed under 5% acidity) If, however, Gascoyne's test shows sample drawn by Geo. A. Thompson at time of gauging to be in excess of 5% acidity, sellers are to make the customary allowance of one cent (1c) per gallon for each per cent or fraction thereof above 5% F. F. A. Oil to be gauged and sampled by Geo. A. Thompson at time of shipment. Oil to be furnished in drums, drums to be returned to sellers, freight prepaid.	33c per gal. in sellers drums f. o. b. Baltimore cash against documents not including drums.

Frank L. Young Company by C. J. Murphy."

and

EXHIBIT 1A

Broker's Note

Merchandise Sold

"One Thousand to Twelve Hundred Barrels (1,000 to 1,200 Barrels of Prime 'A' Crude Menhaden Fish Oil, last

analysis of which showed above 4% Free Fatty Acid, at Thirty-Three Cents (33c) per gallon, in sellers drums, delivered, Baltimore, Md. Drums to be returned to sellers, freight prepaid.

If Gascoyne & Company's test of sample drawn by Geo. A. Thompson, at time of gauging, show free fatty acid in excess of 5%, sellers to make customary allowance to buyers for each One Per cent, or fraction thereof, above 5% Free Fatty Acid.

[fol. 20] For shipment late in January 1922.

To be gauged and sampled by Mr. Geo. A. Thompson at time of shipment.

Terms: Cash against documents.

Buyers and sellers not responsible for any contingencies arising beyond their control.

Brokerage payable by sellers to Reilly-Edwards Company.

Reilly-Edwards Company, Frank S. Reilly, Brokers."

Cedric F. Lee, sworn by the plaintiff, testified that between August 21 and December 24 he was employed by the plaintiff as plant superintendent in South Boston; that he was graduated from Tufts College Engineering School with degree of Bachelor of Science and Chemical Engineering; was with L. Kemp Sons, grease soap manufacturers, in Cambridge, for a year; was with Aetna Explosives Company for nearly a year; with United States Government in explosive inspection department for about a year; with Proctor & Gamble Company at their Staten Island plant, in charge of their cottonseed oil refinery for a year; then with the Dupont Company for approximately a year; and then with Frank L. Young Company; that pressed fish oil is one of its products; that it was produced from Crude Menhaden Fish Oil, with which he was familiar, and also was familiar with the qualities of Prime A Crude Menhaden Fish Oil. Pressed Fish Oil is a trade-name for their refined product. There is another product obtained from Crude A Menhaden Oil known as stearin. [Witness is shown small bottle.] The contents of this bottle have the peculiar appearance of Crude A Fish Oil. It looks like Prime A Menhaden Fish Oil. It would require a chemical test to determine the acid

content of the sample in the bottle. The whitish matter in the bottom of the bottle is known as "foots". The amount of foots can be determined by visual inspection after sufficient settling. It is from that product that stearin [fol. 21] is made. Percentage of foots at a temperature of 50 to 80 degrees in Prime A Crude Menhaden Fish Oil would be 8 percent, in some lower and in some higher, the maximum being 15 percent in Prime A.

[Witness is shown another bottle of oil.]

"Q. 1. What has that oil the appearance of being?

A. It has the appearance and odor of pressed Menhaden Fish Oil."

That is ~~the~~ product that Frank L. Young Company produced.

Mr. Leach: I show you here a photograph marked "4 for identification".

That represents a drum and a dumping. The crude oil in this particular case arrived in drums, and was dumped into a dumping-tank. Picture shows the dumping process. Right under the bung of the drum there is a wire strainer for the purpose of catching solid matter such as wooden chips and any solid material that might be in the oil, that is not oil. The oil is dumped into a tank through very course strainers. From the dumping-tank the oil goes to the heating-tank where it is subjected to heat between 120 and 130 Fahrenheit. It is then put into a chilling-tank where it is allowed to cool. From the chilling-tanks the oil is drawn into strainers, where the pressed oil and the clear oil separate from the "foots" by gravity and flows into the tank below. The clear oil goes through a strainer and the solid fat is held within. The clear is pressed fish oil. The solid fat is then removed from the strainer and put into canvas press bags and pressed in a lever press for the purpose of expelling any further free oil from the solid fat. In the bag we have the stearin. I was in the Frank L. Young Company's plant when the 1,107 drums of McNeal-Edwards oil arrived, and took a sample of it, three or four days, or a week, afterward. I took the first sample from one drum in five, and later from all the drums——

"Q. 2. Did the results obtained from those samples coincide?

Mr. French: One moment——

The Court: Yes, why not? You mean it is a little leading?

Mr. French: No; I object on the ground that the plaintiff is bound by, and cannot attack, the gauging and sampling of the oil in controversy made by George A. [fol. 22] Thompson, the gauger and sampler designated by it in its purchase order (Exhibit 2, supra) to perform that service for it. He certified that it was 'A Crude Menhaden Oil.'

The Court: Well, it lies in my mind this way: that the suggestion is that the contract removes any point of doubt or debate about the quality of goods shipped because the contract appoints a certain person as arbitrator, to decide that question once and for all. Now, it is quite clear that if a term of that sort is intended to be inserted in the contract it should be put in there clearly so that it is there for anybody to read and see. I don't think this contract means that test at all. It does say, as to acidity, that Gascoyne's test is to be accepted by the parties and adjustment is to be made on the basis of it. Beyond that, it says that the oil is to be gauged and sampled by Thompson, but there is no statement that the grading is to be accepted by the parties as Thompson's grading, or anything equivalent to that. I am against you, Mr. French. I will save your exception, Mr. French, and let the evidence in.

The Court: The question is, as you put it, Mr. French, really, whether that cuts out any discussion between the parties afterward as to the grade; that is really what it comes to?

Mr. French: Yes; the plaintiff was to be bound by the gauging and sampling of Thompson, the gauger, selected by it.

The Court: I will save your exception Mr. French, and let this in."

The Witness: I tested the oil for free fatty acid, and observed it for a percentage of "foots". There was no actual test we could perform. It was an observation test.

"Q. 3. What did you observe at that time as to the percentage of foots?

Mr. French: Do I need to repeat my objection to this line of testimony?"

[That by the terms of the contract the plaintiff was bound by, and could not repudiate, the tests made by Gascoyne and the gauger and sampling of George A. Thompson.]

"The Court: Your objection is very basic and I will save you any rights that you may have."

[fol. 23] The witness answered 80 percent of foots.

The oil was pressed several months later, in July or August, 1922. It had been received the latter part of January. We attempted to dump it from the drums during the winter months. We first attempted to take the oil from the drums in July or August because in the first place there was a dispute between the sellers and the purchasers, and the instructions were to hold off until some settlement had been reached,—or some sort of agreement had been reached,—and in the second place it would have been impossible to do so in the cold weather. It is possible to dump drums of Prime A Menhaden Oil in cold weather. The product observed in those drums by means of our sampling process was not Prime A Crude Menhaden Oil. I observed it being dumped from the drums in July and August, 1922. It looked whitish and looked pasty instead of the usual brownish and red color of fish oil. In the summer time it takes from one to five minutes and in the winter it takes from five to ten minutes to dump a drum of Prime A Menhaden Oil. I should say it took half an hour to dump this and some went even an hour or an hour and a half. Of course there were exceptions that took less time, but they were exceptions. The average time, I should say, half an hour per drum. I directed the men to stir the drums with rods to try to loosen up the material. After the drums were dumped they were taken to the heating-tanks. In addition to a yellowish, whitish mass, we observed several large lumps, some fish heads, and one whole fish. After the heating process the oil was dumped into the cooling-tanks, and put through the regular cooling process. We could not get it out of the chilling-tanks and cut down the time of chilling so the mass would not cool to the normal temperature of 50 to 60 degrees. It would then flow by the aid of a rod through the outlet. From the chilling-tanks it then flowed into the strainers. The strainers were burlap bags, about 18 inches across the top by two feet deep and 20 to 24 feet long, on a frame holding approximately five

barrels. In case of ordinary Prime A Crude Menhaden Oil, after setting all night there is left in the strainer one-half to one barrel. After the McNeal-Edwards oil had set [fol. 24] all night, there was left practically the same amount we put in. Practically no oil soaked through. We then removed it from the strainers and put in the press bag. Press bags were about two feet high and a foot and a half across. They are filled about half full and then piled up with steel places between them into what is called a "bay" until you have about 24 or 25 bags high, and then pressure is placed on top of the steel plates. One of these bays holds about three barrels, and the pressing process on Prime A Oil occupies ordinarily two days. With two days' pressing the McNeal-Edwards lot of oil was about three-quarters of the original height, as against one-quarter or a third for Prime A Oil. After we had done as much process pressing as we could, we processed it for stearin, that is neutralized it with stock to produce a refined stearin below 5 percent Free Fatty Acid. The final nature of what we get in the bag after pressing Prime A Oil is a hard, firm cake of a cream or ivory color, but with the McNeal-Edwards lot the result was a very soft, salvy mass, which is not as useful as a hard cake for the manufacture of stearin. We finally got merchantable stearin, but did not get merchantable fish oil.

"Q. 4. Even the amount that you got was not a large amount of Prime A Oil?

A. It was not."

The McNeal-Edwards oil was weak oil. In summer temperature it would be liquid. If allowed to stand in the tank over night it would be cloudy, producing a semi-solid mass. That is, this oil solidified at a comparatively high temperature. Average cost of putting Prime A Oil through the process would be a fraction less than two cents a gallon, and of putting this McNeal-Edwards oil through was five or six times that at least.

On cross-examination, the witness testified that he is now employed by The Jackson Door and Window Company, of Everett, and had been employed there prior to his employment by Frank L. Young Company; that he did not know of any Frank L. Young Company now doing business in Boston. He knew of a Mr. Thompson coming to Frank L.

Young Company's factory in February, 1922. He was with him (Thompson) part of the time, he could not say exactly [fol. 25] how long, a few minutes now and then. He gave him (Thompson) one of his men to remove the bungs from the drums, and helped him to draw a sample.

"X Q. 5. As I understand your testimony, the complaint of Frank L. Young Company was that there was excessive stearin in this oil?

A. Yes, sir; part of it."

I think we did bring something else into it. I think I did mention some fish-heads and large lumps, and one whole fish. There were 1,107 barrels in all. I found one whole fish twelve or fourteen inches long. It looked like a Menhaden to me, and was in one of the containers. Then there were some fish-heads and some meal, and some lumps. I did not count the fish-heads and could not give any idea as to the number, or the number of lumps. It is common to find in Menhaden oil some evidences of the remains of fish in good crude oil.

"X Q. 6. In any event you would say, out of 1,107 barrels of oil, the amount was very small, would you not?

A. Why, of fish, yes."

Beside this there was a lot of mealy white substance, which I should suppose was fish meal, a residue from the boiling process in which the oil is separated from the tissues of the fish.

"X Q. 7. Is that an assumption on your part, or did you make a chemical test?

A. We did not make any chamical test, no, sir, and I cannot give you any idea of the amount.

X Q. 8. Can you give us any idea what the aggregate quantity in the 1,107 barrels would be?

A. Why it would be inaccurate, if I did it.

X Q. 9. Then you can't give us any accurate idea without a chemical examination?

A. No accurate idea without a chemical examination.

X Q. 10. And you made no chemical examination?

A. I did not."

All Crude Menhaden Oil has stearin in it necessarily. It would not be Crude Menhaden Oil unless it had.

"X Q. 11. When you gave a description of the individual [fol. 26] experiments you did not state the temperature?

A. I don't recall I did mention the temperature.

X Q. 12. That is extremely important, is it not?

A. Why, yes.

X Q. 13. Did you find anything in either of these barrels, representing what is known as tank-bottoms?

A. Why, yes.

X Q. 14. Tank-bottoms are not stearin?

A. They are not.

X Q. 15. And they are not foots?

A. They are a mixture.

X Q. 16. What is the difference between tank-bottoms and foots?

A. Tank-bottoms would be a mixture of meal and residue with some foots included.

X Q. 17. Which, in your experience, would be the most serious charge to make against the oil—stearin or tank-bottoms?

A. The most serious would be stearin.

There is always stearin in any Crude Menhaden Oil.

X Q. 18. Is it true that for some purposes oil with a considerable quantity of stearin in it is just as good, or better, than oil without, or with a small quantity?

A. No purposes I could imagine.

X Q. 19. Do you consider 15 per cent excessive?

A. Fifteen percent is the maximum allowable for A Grade Fish Oil.

Redirect examination.

By Mr. Leach:

Drums were kept in the yard for three or four weeks in the sun before they were poured, in July and August, and when they were poured they still showed this salvy mealy substance.

Crude oil produces tank-bottoms. It is the residue in the settling tanks, and there are also tank-bottoms which would be in storage-tanks of crude oil. When tank-bottoms are spoken of it might be one or the other.

I had some talk with Mr. Thompson when he was at the plant.

ALBERT SEAR.

Testified on direct examination:

I am employed by Cook, Swan & Young, successors of Frank L. Young Company, and was employed by Frank

L. Young Company through the entire year of 1922. Had been employed by that company 35 or 37 years, mostly in straining and pressing fish oil. I didn't see any of the McNeal-Edwards lot of oil in 1922 when it was being [fol. 27] dumped. Know it was heated and put up in the chilling-room. I first saw the oil in July or August in the chilling-room.

"Q. Could you chill it as much as the other oil?
A. Well, it seemed to be about the same."

I had to do with the putting of the oil in the strainers. When I put Prime A Menhaden Oil in the strainers I filled them to the top, and would find one-quarter of it in the strainers in the morning,—from one-half to a barrel. As to the McNeal-Edwards lot of oil, there would not be much drawn out of it. Perhaps it would settle down one-half to a barrel in the strainer. There was no grain in this oil. By grain, I mean a sort of separation. It separates in the tank while it is chilling. The foots settle to the bottom, and appear in small particles. It is sometimes like wheat, little lumps that separate from the clear oil in Prime A Oil. The separation did not take place in the McNeal-Edwards oil. When the bags were put in the bays for pressing it did not move or run through free like other oil. When I increased the pressure on the bays more than usual, they would slide from one place to another. The moisture and slime that was there would ooze out of the bags. The contents were slimy. It was not oil. Oil wasn't free enough, or separated enough to ooze through the pores of the bag. There was moisture in it. The bays are piled six and a half feet, or seven, high. When they are all pressed they would be about two and a half feet from the floor with Prime A. The McNeal-Edwards lot was about two and a half feet down from the top. It took longer to press it. After getting through the pressing process with Prime A Oil there might be from one-half to one barrel of good, nice hard stearin, or hard cakes in the bags. Could not remove the foots of the two presses after the second pressing with this oil. We didn't get hard cakes from the pressing of the bags of McNeal-Edwards oil. It was soft and mushy.

WILLIAM B. SCHUTT.

By Mr. Leach:

Have been engaged in pressing fish oil 35 to 36 years. I remember the McNeal-Edwards oil. I had to do with dumping that oil. I think that Mr. Lee's description is just right. It was dumped in warm weather, in the sumer of 1922. It was a dirty matter to get it out of the barrels, some of [fol. 28] it, most of it. The barrel is poured with the bung down, and you would have to tip it a little and stick a rod in and stir it. It took a long while to dump those barrels, I don't remember just how long, longer than the ordinary barrel. It would take half an hour for one drum. I saw this oil filled into the strainers, and after it had stayed there all night went down about two inches probably from the top. I filled the mass from the strainers into the press bags. I set the bags up in the bay, and they would not stay there, they were sliding sideways when the pressure was applied. Acted to me like water and slime. When we got through the pressing process there was a dirty matter in the bags. It wasn't a solid cake, it was mushy. There were a lot of scales in the drums when we dumped them, some fish and particles of fish, and kind of yellow matter that come out of it.

Cross-examination.

By Mr. French:

I did not undertake to separate the dirty water from the clean, or measure the solid substance, the particles of fish that I saw. I was too busy to pay much attention to them.

"X Q. 1. To a greater or lesser extent, those things are found in all Menhaden oil, are they not.

A. Well, we have had Menhaden oil that you could put in at night, and it would just be coated around the burlap.

X Q. 2. In other words, as with all other things, there is a difference in Menhaden oil. Some is better than others?

A. Well, I guess there is. * * * I made no effort to measure the amount of any of the alleged impurities.

X Q. 3. It is not very clean stuff, anyway, is it?

A. Well, some of it isn't bad. That was. I have never seen any Menhaden oil that looked like this oil before or since."

PERCY L. YOUNG.

By Mr. Leach:

I was treasurer and a director of Frank L. Young Company in 1922. We were, at that time, in the business of pressing and refining fish oil, since 1908. I saw McNeal-Edwards lot of oil that came in in January, or February, 1922, in the drums, and I saw a sample that was sent over from South Boston to the office. The sample was extremely [fol. 29] thick, practically no free oil. The percentage of foots at a temperature of 50 to 60 degrees in Prime A Crude Oil would average 6 to 8 per cent. In this oil it was over 80 per cent. The oil in the McNeal-Edwards lots was not Prime A Crude Menhaden Oil. It was a scratch lot of oil that might be called stuffed oil. The market value on Menhaden oil in Baltimore, in 1922, was around thirty-two or thirty-three cents a gallon F. O. B. In my opinion the market value of the oil received from McNeal-Edwards from Baltimore in 1922 was somewhere around seventeen to eighteen cents a gallon F. O. B. I had nothing to do with the processing of this oil, and I never saw it in process. The almost invariable custom of buying fish oil is through a broker, and the dealings prior to the sale are with the broker. It is customary for the buyer to make complaint to the broker, and to receive answers to the complaints made from him. We made complaints to Reilly-Edwards, the broker in this case.

Cross-examination.

By Mr. French:

Was treasurer of Frank L. Young Company at time of this transaction. The company is now in dissolution. Certain assets of Frank L. Young Company were taken over by Cook, Swan & Young combination. This suit was not taken over. Have known the house of McNeal-Edwards Company for a great many years. I am sure that we bought considerable oil that came from that plant before, though I have no recollection of any specific transaction prior to this one.

Shown a letter signed by C. J. Murphy, president of the company.

Mr. French (reading):

"We certainly feel that as an honorable concern you do not feel like taking any advantage over one of your customers who has been dealing in your oil for years. Such being the case we feel you owe it to us to send one of your concern, or one of your representatives, to visit us and see for yourself that conditions are absolutely as we state."

I notice that the letter is dated June 10, 1922. I remember that Mr. Thompson (meaning Mr. George A. Thomp-
[fol. 30] son) had been sent here some time in February. I knew who he was, but think that was the first time I ever met him. After I made the first complaint to Reilly-Edwards Company with reference to this order, Mr. Thompson did come here. In the presence of some one representing Frank L. Young Company he took samples of the oil. He came up after our request that somebody should be sent. All we wanted was an impartial showing of what that stuff really was. Do not remember of any three tests being taken. There was a test made, at the time the draft was made on us, for free fatty acid. Have known the firm of Gascoyne & Co. for some time. They had never done business for us directly that I know anything about. I know that Mr. Thompson has drawn a great many samples of oil that we had bought, and that Mr. Gascoyne had made analyses of them. I am not a chemist. We paid for the oil according to the contract. "Check against documents." The documents were delivered to us prior to the time we paid for the goods. I do not remember that I asked any favor regarding payment. I have no distinct recollection of asking for any relief from this provision of the contract.

First made complaint to the broker immediately after arrival of the oil at our plant. I think the next day. Oil arrived some time in latter part of January. We sampled it after it arrived at the plant. We never made a complaint until we saw what we were complaining about. Complaint was made to Reilly-Edwards Company shortly after the goods arrived at the plant. Do not know exactly when that was, but my recollection is some time the latter part of January 1922. I believe the first complaint is in the correspondence; am not sure that we made any complaint except by correspondence; not sure whether we telephoned or not. We probably did. I am not sure, but I probably did

make complaint over the telephone to Reilly-Edwards. I have no distinct recollection about it. We complained at various times during the controversy we had with them. It was strung out over a period of months, I believe. I went to Baltimore to make complaint; nothing very distinct, but I believe I did; complained that the goods were not what we bought, that it was not a good delivery.

[fol. 31] "X Q. 1. Is that all?

A. Well, that pretty well covers the case.

X Q. 2. I asked you if that was all. I want your recollection, if you have any, of the conversation that you had with anybody representing Reilly-Edwards, in Baltimore.

A. I have no distinct recollection of any conversation with anybody, or of going to Baltimore at the time you refer to. I think that I did go there, and if I did go there, I think I probably described the oil at that time.

X Q. 3. Then all you vaguely remember is that you stated to somebody in Baltimore, to Reilly-Edwards, that the oil wasn't up to contract?

A. Well, I don't remember stating that much to anybody in Baltimore.

X Q. 4. Didn't you so testify a few moments ago?

A. I said I believed I went to Baltimore some time ago, not very long after that oil arrived here, on that matter. I haven't any distinct recollection of any particulars about any conversation with anybody there at that time.

X Q. 5. In the first place, you don't distinctly remember any conversation at all?

A. No, I have no distinct recollection of having gone to Baltimore and made complaint.

X Q. 6. Of course if you do not remember whether you went or not, you don't remember what you said?

A. That's it."

Well, any oral complaint that I would have made would have been on the basis of the actual appearance of the oil when it arrived.

"X Q. 7. What did you complain of, in your own mind—we will put it that way—with respect to the oil?

A. The complaint of that oil primarily after it arrived there was that it was not Prime A Crude Oil inasmuch as it was about 80 some odd percent solid matter. That is, as far as we could determine the quality of the oil at that time.

Later, when we had occasion to try to run it through the process, we discovered other objections. After we had actually dumped the entire lot, we found it very difficult to work. It didn't act like any other lot we had in the plant. But we didn't know that at the time of the original com-[fol. 32] plaint, shortly after the arrival of the stuff, because we didn't have occasion to dump it or work it through our presses.

X Q. 8. Is there anything else that you had in your mind at that time in the way of complaint against this oil?

A. I believe the question arose of some discrepancy between the free fatty acid test as reached by Mr. Gascoyne and as reached by us after I believe there was some difference in the free fatty acid.

X. Q. 9. The free fatty acid matter was adjusted finally, wasn't it?

A. Yes.

X Q. 10. So that's out of the question now. You didn't make any explicit statement of the fault that you found with that oil, either to McNeal-Edwards, or to Reilly, Edwards, within a short time after you received it?

A. Well, I probably did, but I can't remember distinctly just what I did say either to them or anybody else. It is mainly in the correspondence, I think. I believe I made a complaint that there were tank-bottoms in the oil, but I am not sure.

X Q. 11. Do you remember whether or not that was at any time your principal fault?

A. I wouldn't say that it was the principal fault. I would say that it was part of the sum total, an important part of the sum total.

X. Q. 12. Why didn't you send the oil back, if you found it as bad as that?

A. We agreed to pay for it; we had to pay for it.

X. Q. 13. In other words, if your recollection is correct, you paid for the oil after knowing, or, as you say, believing, it was not in accordance with the contract?

A. We paid for it under protest when we did pay for it.

X Q. 14. Was that in writing?

A. Yes.

X Q. 15. Did you ever complain to Edwards, or Reilly, Edwards, that this oil was fully 40 percent tank-bottoms?

A. I believe I did; yes.

X Q. 16. Let's see if this refreshes your recollection. Do you remember going into the office of Reilly, Edwards in Baltimore any time early in February and complaining that this oil was bad because it contained 40 percent tank-bottoms?

[fol. 33] A. I haven't any distinct recollection of going to Baltimore at all, but I am pretty reasonably certain I did go down there at that time.

X Q. 17. Did you at any time make that claim to Reilly, Edwards that the oil was bad because of tank-bottoms?

A. Yes, I believe I did I have no recollection of making any complaint to them in Baltimore at that time, because I don't remember having been in Baltimore at that time."

The drums are piled up in the back yard of Frank L. Young & Company.

[Mr. French reads letter addressed to Frank L. Young Company from Reilly, Edwards Company, dated February 13, 1922. Admitted in evidence and marked "Exhibit A".]

EXHIBIT "A"

"In regard to the 1107 barrels of McNeal Edwards Company's oil, we beg to advise that we laid before the McNeal Edwards Company in a letter all of the statements made by you to us in regard to the quality *fo* [sic] shipment.

We are today in receipt of a letter from the McNeal Edwards Company, under date of February tenth, stating that your claim that the shipment of oil was 40% Tank bottoms, is absurd, that the oil was 'A Grade Oil' and that they consider that they made you a good delivery under your purchase and that they now demand immediate settlement of the balance due them as per contract.

We hope to have this settlement from you by return mail."

[Mr. Leach reads letter from Frank L. Young & Company to McNeal-Edwards Company, dated June 10, 1922; admitted in evidence and marked "Exhibit 7".]

EXHIBIT 7

"Inasmuch as we have been requested several times by Messrs. Reilly-Edwards Co. to return the 1107 drums

(which you shipped us) when emptied, we feel that we should let you know just how the matter stands.

The facts of the case are that the oil contained in the drums is so thick that it is almost impossible to empty them. We naturally felt that with the advent of warm weather the oil would become perfectly limpid and empty out readily, [fol. 34] because we have never had any oil before but would thin out in warm weather and become in a measure workable. We certainly feel that you would not have intentionally shipped us any oil such as you did.

We presume that the oil was not when you filled it into the drums, and therefore you did not realize how thick the oil actually was when not in a heated state.

We protested most vigorously to the Reilly-Edwards Co. at the time the goods were received by us, our claim being that to an absolute certainty the goods delivered were not a good delivery on our purchase, and we have no doubt but what our protest and claim was duly presented to you by them at the time. Mr. Edwards of Reilly-Edwards Co. was in Boston a few days ago, and at our request he visited our factory and looked over the goods and watched our men trying to empty a few drums.

He can most sincerely vouch for the facts as stated by us above.

We certainly feel that as an honorable concern you do not feel like taking any advantage over one of your customers who has been dealing in your oil for years, and such being the case, we feel that you owe it to us to send one of your concern or one of your representatives to visit us and see for yourself that conditions are absolutely as we state.

There has been some serious mistake made in shipping such goods to us, and naturally you should be vitally interested to have the mistake rectified and not have your reputation suffer. We are averse to making any trouble in this matter, and will not do so until after it would develop that you are not willing to meet us in a fair and square manner and investigate conditions as they can be shown here.

Kindly advise us by return mail when it will be possible for you to send your representative here to look into the matter, and oblige."

A letter from McNeal-Edwards Company to Frank L. [fol. 35] Young Company, dated June 20, 1922, was admitted in evidence and marked "Plaintiff's Exhibit 8".

EXHIBIT 8

"We received your letter and contents carefully noticed, first will say that we sold you the tank of oil and not the oil off the top of the tank. We also sold it to you on a 5% basis and a deduction of one half cent per gallon of each one per cent of F. F. A. over five, which you did not live up to.

The oil that we shipped you was good limpit oil with the exception of about 75 barrels which was close to the bottom of the tank but this was A prime oil which we can prove by Mr. Thompson, if the oil had contained 40% tank bottoms as you contested it would have gone higher in F. F. A., you will notice that the sample that Mr. Thompson drew at your place was about the same as the sample he drew when he weighed it.

We feel that we delivered you a very very good grade of oil which Mr. Thompson will testify too, so their is no need of us sending a representative to your place to see the oil, we will expect you to ship the drums as soon as possible. We are, Yours truly."

Tank-bottoms have nothing to do with free fatty acid. Total freight on the oil from Baltimore to Boston was $1,707.78. Cartage charges after reaching Boston amounted to $328.

JOHN L. ROUNSEVELL:

By Mr. Leach:

Employed by Frank L. Young Company in the summer of 1922, after July 15th as assistant to the superintendent, Mr. Lee. I saw, I think, about thirty-five or forty drums of McNeal-Edwards oil dumped. I went away about the middle of August. I noticed the oil was very thick for oil to be at that time of the year, and it contained more or less waste matter and a lot of water and substance in the oil. I saw it going through the heating-tanks and from there to the chilling-room and into the strainers. It was so thick and slimy

that the separation that should take place under normal conditions did not take place in the strainer. The same thing applied to the pressing process. Where there should be a great quantity of oil come out, there was practically none.

[fol. 36] "Q. 1. Did you know what Prime Grade A Menhaden Oil was?

A. Yes.

Q. 2. Was that what that was?

A. Not to my knowledge."

Cross-examination.

Mr. French:

I first saw the oil in the yard in the drums. Personally I had nothing to do with the operation except as supervisor. Supervised part of it. First thing I did was to dump it. I saw only thirty-five or forty of the drums dumped. Made no particular observation, except in a general way, that the quality was poor. There were 1,107 barrels [drums] in all. There is oil known as A Crude Menhaden Oil, or Prime A Crude. They are must the same thing.

"X Q. 3. 'Merchantable Prime A' and 'A Crude' and 'Merchantable', all mean the same thing?

A. No. Merchantable would not, because it might be merchantable oil of some other grade."

It might be B grade, or gurry. A and Prime A are practically the same thing. I will not say that it was impossible for oils to be confused in the factory, but it is not probable. I was not there when Mr. Thompson came up to do the sampling, and was not present at any sampling of this particular oil.

CORNELIUS J. MURPHY:

By Mr. Leach:

In 1922 I was president of Frank L. Young Company, and am now connected with the successor to that company. Have been in the business of purchasing and processing fish oil for forty-six years, and for at least thirty-six years I

have been more or less interested in the buying and selling of fish oil. I recall the purchase of 1,107 drums McNeal-Edwards oil in 1922. Did not see the samples of oil before we bought, but did see them after the goods had arrived here. I saw the sample which had been taken at our plant. I saw the samples labelled "McNeal-Edwards Oil", representing 1,107 drums fish oil from Reilly, Edwards. My observation is that sample was very thick, full of foots and could be described almost as tank-bottoms from a storage tank. My impression is that it was about 80 percent foots. We contracted for Prime A Crude Menhaden Oil, but the oil we received was not Prime A Crude Menhaden. It was [fol. 37] too heavy in foots to be able to be passed as A Oil. I should say it was worth at that time about seventeen cents a gallon. Value at that time of Prime A Crude Menhaden Oil in Baltimore was about thirty-three cents a gallon. Sent telegram to Reilly, Edwards as follows:

"February 3, 1922. Reilly, Edwards Co., Baltimore, Md. We find the 1107 drum lot also very thick and 7.33 acid, which is not a good delivery. Frank L. Young Company."

On February 27, 1922, we telegraphed as follows:

"Reilly, Edwards & Company, Maryland Trust Bldg., Baltimore, Md. We hereby demand immediate fulfillment of various written contracts according to which 1107 drums McNeal, Edwards oil received did not constitute good delivery and pending reasonable settlement stands rejected. Frank L. Young Company."

In the purchase of fish oil, it is more customary than not to work through brokers. All transactions are made with them. Broker in a case like this is the party who invoices the goods, and who collects the money. We look to our broker for adjustment. That is the custom.

Plaintiff's Exhibit 9, letter F. L. Young Company to Reilly, Edwards Co., dated March 4, 1922:

EXHIBIT 9

"Acknowledging receipt of your letters of the 3rd instant and pursuant to telephone conversation with your Mr.

Edwards today, we repeat that we are extremely desirous of settling various matters at issue and as tangible evidence of this desire to meet you at least half way and with the understanding that your Mr. Edwards will come up to Boston at his very earliest possible convenience to iron out the remaining question, we enclose herewith our check in full settlement of the balance due on the McNeal-Edwards transaction.

We feel that we are accepting a very material loss on excess Foots beyond what we had a right to expect, and must have it thoroughly understood that our action in this mat- [fol. 38] ter does not prejudice our rights in any of the other points still pending."

We had no previous contracts direct with McNeal-Edwards, but had had a good many through a broker covering perhaps ten or fifteen years, at intervals. I know George A. Thompson. Met him on his visit to Boston at our office after he got through testing the oil. Had worked for us through a broker or through sellers. It was a part of their duty to perform, to furnish the gauger and have it gauged. I never met Mr. Gascoyne until today, but I think we had employed him once or twice about 1925. I personally took no part in the processing of this oil, and examined only the bottle said to contain the sample. Mr. Thompson left a bottle with me. I do not know where it is. It is lost. I know we cannot find it, for we hunted everywhere for it. It was lost for a couple of years. We began to hunt for it when the case was coming up two years ago. We went looking for that bottle. I have not got, and cannot produce, the sample left by Mr. Thompson, and I appreciate that might be very important to the defense of this suit. I have no sample that Mr. Lee [plaintiff's superintendent] drew. He was our chemist.

Redirect.

Mr. Leach:

I observed the sample Mr. Thompson took.

"Q. 1. Did it coincide with the sample Mr. Lee took?

Mr. French: I object.

The Court: Did he observe any difference in the two samples, between Thompson's and Lee's? You can have that, Mr. Leach. I will admit it.

Mr. French: Save my exception.

The Court: Yes.

Witness: I could not see any difference in the two samples. Both samples appeared the same to me."

Samples kept in the back part of our office, in same room with safe. There is no particular place to keep them. They are in cans but the bottled samples were kept right in the office itself. There are quite a few of them on top of my desk, and on the adjoining desk, and quite a few on the [fol. 39] mantle in the front office. Probably 40 four-ounce bottles on top of my desk today. There are seven people in the office. No persons are forbidden to handle samples. Mr. Cotter requested us to look for them. Written contract signed by McNeal-Edwards never was received by us.

Recross-examination.

Mr. French:

I realized the very great importance to the principal issue in this case of the samples which we received from Mr. Thompson.

"X Q. 2. You realized, did you not, that if that sample were in existence it might have settled the case in our favor?

A. I cannot say as to that.

Q. 3. It was a sample taken by Mr. Thompson in your storehouse and left with you by him as representing the result of his sampling?

A. Yes.

X Q. 4. Do you mean there was no system whatever observed with reference to the care of these samples?

A. Why, there was more care taken of these samples than the ordinary. We have no real system. My attention was not directed to it after it was left with me until Mr. Cotter asked me about it two years ago.

X Q. 5. So that from the time of the beginning of this suit, four or five years ago, whenever it was, you had not given the matter any thought?

A. No, but we always felt the samples were there. We gave it thought. It would have been a perfectly easy matter for us to have properly labelled that sample and put

it in a place that was safe for use at this trial. The sample made by Mr. Lee was lost at the same time."

We eventually worked the oil received from McNeal-Edwards Company with other oil, so as to make it saleable, and worked it off and sold it. The oil disappeared entirely from our factory about the end of 1922, that is within a year after the delivery.

CEDRIC F. LEE, recalled:

I took samples of McNeal-Edwards oil after it came in, and put it in a bottle labelled "Sample of 1107 Drums Oil, Reilly, Edwards, Received"—and the date. It was sent to the office.

Cross-examination.

By Mr. French:

Saw it after that at the office, within a week or two of the time I sent it over, on Mr. Murphy's desk, labelled. I [fol. 40] did not open it. I picked it up, examined it, and put it down again on Mr. Murphy's desk. Think I saw it again on his desk, subsequently. Where he would have it under his eye, at his desk, all the time. Last saw it about two weeks after I sent it over. Never asked to see it after that, that I can remember. I realized samples are important in any trial of this nature.

The bung holes in the drums were some two inches, some two and one-half, and some three inches in diameter. I have testified that oil was leaking from these drums in February, and that when I saw them in August it would not flow freely, that is, without the aid of stirring or agitation. It did flow in due course of time, and if you stirred and agitated it then the oil would flow.

Redirect examination.

Mr. Leach:

There was a very small amount of oil oozing through cracks in these drums.

GEORGE H. MCNEAL:

Direct examination.

Mr. Leach:

I am connected with McNeal-Edwards Company and was in 1922. Had then been in fish business twenty-seven years. Have heard of Frank L. Young Company. Did not know what their business was, only oil buyers. Didn't know their business was pressing fish oil. Knew they had a plant in Boston. Crude Menhaden Oil besides being used in pressing is used a good bit in soap. Cannot recall how long we had been dealing with Frank L. Young Company, possibly had sold them several lots of oil—couldn't say without records. 1,107 drums were shipped to Frank L. Young Company about January 16th, under contract made through Reilly, Edwards Company for delivery of Prime A Crude Menhaden Oil. McNeal-Edwards Company have been in business of manufacturing and selling Crude Menhaden Oil in Prime A variety since 1901.

Cross-examination.

Mr. French:

I was not told by anybody to what use Frank L. Young Company were going to put this particular oil. I did not know whether they bought it for reselling, pressing or for any other purpose. We had no direct dealings with any of the Frank L. Young Company people, only through brokers.

[Plaintiff's evidence closed.]

[fol. 41] GEORGE A. THOMPSON:

Direct examination.

Mr. French:

Live in Baltimore, Maryland; sixty years old; have been sampling fish oil for thirty-five years and in gauging busines for twenty years. Give my whole time to this work. Am sworn official of State of Maryland. Knew McNeal-Edwards Company and Frank L. Young Company. Some

time in January, 1922, made a sample of certain oil at McNeal-Edwards factory that was to be shipped to Young Company.

"Q. 1. And will you state how you made the sample and what the result was?

A. I have a sampler which extends through the bung hole to the bottom of the drums. The slide closes going down and it gets a percentage of oil from the bottom of the barrel and the top of the bung or the beginning of the bung, every portion, and it is divided up into sections to keep it from running down. When I withdraw that I open my slide and put it in a pail until I am through the whole oil.

Q. 2. So that you have a sample of every inch from the top to the bottom?

A. Every inch from the top to the bottom. I took an average sample from every fifth barrel of the 1,107. I took two samples from McNeal-Edwards on the sixteenth day of January. One I turned over to Dr. Gascoyne and the other to Reilly, Edwards.

Q. 3. I hand you a bottle and ask you if you know what it is?

A. Yes, sir. That is a sample I drew at McNeal-Edwards' plant at Reedsville, Virginia, on the 16th of January, in the manner which I have described."

[Bottle marked "Defendant's Exhibit A", and a small can is marked "Defendant's Exhibit B".]

Bottle was filled right here in the court room this morning from this can and the can is the one I delivered to Mr. Gascoyne.

"Q. 4. Now, what kind of oil is that?

A. Prime A Crude Menhaden Oil, a product which I have known for the last thirty odd years."

The broker pays the gauger. There is no difference in the trade between Prime A Menhaden Crude Oil and A Menhaden Crude Oil. Not in the handling.

Made later sample of oil in drums at Frank L. Young [fol. 42] Company's factory, the 20th of February, 1922; at the request of Reilly, Edwards Company I sampled it there at the South Boston plant. The senior Mr. Young sent me to the plant. I described to him how I drew the sample at the plant at Reedsville. He did not go with

me to the South Boston plant. I sampled all I could get at, I should judge about one thousand barrels. The reason I did not sample the others was that we could not get at them. There was a man with me from the plant all the time.

[Witness shown bottle, and said that it contained the sample procured on the occasion as to which he was testifying.]

I took these samples in the same way that I took those at the factory at Virginia, with the same instrument. From every package that we could get at. I carried one to Frank L. Young Company and the other two to Reilly, Edwards Company, and we took them to Gascoyne.

"Q. 5. Now, when was this placed in that bottle?

A. This morning, right here in the court room, from the container with my own tag on it.

Q. 6. As I understand it, this bottle which I have in my hand, and which is not marked, came from the tin which I held in my hand this morning, in the court room?

A. Yes, sir."

[Bottle admitted in evidence and marked "Defendant's Exhibit C".]

"Q. 7. Now, from your long experience is that sample Crude Menhaden Oil?

A. Yes, sir.

Q. 8. Prime A Crude Menhaden Oil?

A. Yes, sir.

Q. 9. Are there any tank-bottoms in either of those samples?

A. No, sir.

Q. 10. And that is just as they came from the barrel?

A. Yes, sir. Samples were taken on the 15th of January, 1922.

Q. 11. It is not your province to examine oil for stearin or any of its chemical component parts?

A. Only to see that it is free of water and tank-bottoms.

Q. 12. I call your attention to that bottle, and ask you if you know what it is?

A. Yes, sir. That is what we call tank-bottoms.

[fol. 43] Q. 13. Have you any knowledge of where they came from?

A. No, sir.

[Bottle admitted in evidence and marked "Defendant's Exhibit D".]

Stearin is found in all Menhaden fish oil. So far as trade designations go, there is no difference between A Prime Crude Menhaden Oil and A Menhaden Oil in my work. There may be a difference between the barrels but I don't know. Prime A and A are all the same in grading it.

[Witness shown bottle marked "Exhibit 5".]

Q. 14. I ask you what that looks like?

—. That is Crude Menhaden Oil.

Q. 15. I call your attention to Exhibit 6 for identification, and ask if that is Prime A or Crude A Menhaden Fish Oil?

A. That is pressed oil.

In my opinion and experience the samples which I have introduced here, and which have been offered in evidence, fairly indicate the quality of the contents of the drums which I examined.

"Q. 16. Is there any way in which it could have been tested more accurately?

A. Not by a sampler.

Q. 17. Then when you say that, you mean to suggest that the chemist is the best to examine it?

A. I should judge so; I couldn't say."

I never saw any Crude Menhaden Oil that would not congeal at freezing point. It will conceal at much less than freezing point. When I took the sample to Mr. Young at the office of Frank L. Young Company, I took three bottles down and said: "One for you, either one you wish to take." They were in pint jars. He picked one out and kept it, and I took away the other two which I subsequently delivered to Reilly, Edwards, and from there they were carried to Mr. Gascoyne's office. I went with them.

"Q. 18. In transferring the oil from the can to the bottle, this morning, what, if anything, did you do to the can just before pouring it into the bottle?

A. Shook it up thoroughly."

I am in no way connected with or interested in the McNeal-Edwards Company, or the Reilly, Edwards Company. [fol. 44] Reilly, Edwards & Company, the brokers, paid the expenses of my coming to Boston to take samples here.

Cross-examination.

Mr. Cotter:

Had no agreement or understanding with Captain McNeal regarding the expense or cost of my trip here. Had known McNeal-Edwards Company prior to 1921 for twenty years at least, ever since I have been in the gauging business. Made a great many samples of oil for them. They have not paid me a great deal of money; I get it from the broker. Remember meeting Harold Young in Baltimore two years ago. Following my sampling of January 16, I made a report to Reilly, Edwards, and Reilly, Edwards reported to McNeil-Edwards that there were seventy-five barrels which were weak oil, not Crude A. Did not tell Mr. Young that there were seventy-five barrels in that lot that "never should have been sold for oil". I reported that, before it was shipped, to Reilly, Edwards to report to Frank L. Young Company when they bought the contents of the tank. They knew they were going to get some heavy oil in it. Reilly, Edwards said they reported to Frank L. Young Company. All the oil which they (McNeal-Edwards) had was in that tank [meaning the storage tank already referred to]. This lot of oil was all that McNeal-Edwards had. Do not know whether it was the last in the tank or not. I knew when I came to Boston that there was serious controversy over the character of this oil, or I would not have gone up there. In this case the samples I first took were in pint glass jars. They were not sealed. I had them in my possession until I delivered them to Reilly, Edwards and to Mr. Gascoyne. I left one of them with the Young Company. I did not leave them with Reilly, Edwards unsealed. They were left with Mr. Gascoyne by him. They were not sealed. They were put into these metal cans in my presence. The cans were not sealed in my presence. Did not know that this was a court case at that time; knew there was trouble. Since it was left by me in Gascoyne's office in the condition which I have described, six or seven years ago, I have not seen it until today or yesterday. The reason for distinguishing them by numbers 1 and 2 was that I had drawn one at Reedsville and one at Boston. The small bottle, No. 1, is from [fol. 45] Reedsville, No. 2 from Boston. They are both Grade A Oil, and both are the same as far as my observa-

tions are concerned. I drew them out of the same package. In my opinion these two bottles look identical. I do not know whether acid ever accumulates in this Grade A Oil by reason of any lapse of time. Haven't been to Captain McNeal's plant, nor had any conversation with him by letter, nor seen him at all, until the night we came up here for this trial. I never had any talk with Captain McNeal, prior to this shipment, when I was sampling their oil, with reference to Frank L. Young Company. I examined one out of five of 1,107 drums of oil, or 220 drums examined, and on that test I reported to Reilly, Edwards that there were seventy-five barrels of heavy oil. There is no difference between heavy oil and weak oil, I should say.

[Witness was shown the sample which he testified had been taken in Boston.]

"X Q. 19. Let me ask you this, whether this Exhibit No. 2——

A. That's the Boston.

X Q. 20. Didn't you state a moment ago in answer to Mr. French that they looked like Grade A Menhaden Oil?

A. I said it was Grade A Menhaden Oil.

X Q. 21. That's what you say now?

A. Yes, sir.

X Q. 22. And you say that is? [Indicating sample testified by witness to have been taken in Reedsville, Va.]

A. Yes, sir; that's been all riled up, shook up. It will settle away down to here [indicating a point about one-fifth of the distance from the bottom to the top of the bottle].

X Q. 23. How long will it take to settle?

A. In a certain temperature, five to ten hours. If you have it in a certain temperature you will find it that way tomorrow."

[This testimony was given on Wednesday morning, February 8th, about 11 A. M. The case went to the jury on Friday morning, February 10th, at 11 A. M. The samples referred to were kept in the custody of the clerk, and during court hours were motionless on the clerk's desk. At no time between Wednesday at 11 A. M. and the time that [fol. 46] the case went to the jury did the defendant's samples give any indication of settling.]

"X Q. 24. Have you made any test of this oil in any other of these cans by putting it in a bottle and allowing it to remain five or six hours?
A. No."

Redirect.

Mr. French:

I personally handed the sample which I took on January 16th in the factory in Virginia to Mr. Gascoyne in the tin which I have described. The same is true of the test made on February 20th in Boston. They have been in my custody all the time. There would be no object or purpose in sealing it up before I gave it to Mr. Gascoyne unless I was requested to do so by the buyers. He, of course, would have to unseal it in order to make the chemical examination. In those samples, the proper proportions of thick and heavy oils was put into the cans so that it would reach a fair average. Of the barrels I examined in Boston, only those seventy or seventy-five looked thick to me. They were heavy, or weak as they call it. They were Crude Menhaden Oil in color, that is what the sample is, A or Prime A, that is the only way we term the color of oil, as A. I examined something like one thousand barrels in Boston. I could not say whether in the ordinary course of transaction of this kind I should expect to find that percentage of oil heavier than the rest. In the winter time I should always expect to find some of the oil heavier than the rest. I took samples from each of the thousand barrels, and the samples showed the average quality of the oil.

Q. 30. But you do not consider anything is a gauging test but color and sweetness?
A. And free water and tank-bottoms.

The Court: An excess of stearin would not affect the grade of that Prime A or A in your mind?
The Witness: No, sir."

The tag which Mr. Cotter asked me about is in my handwriting. Marked "Sampled in Boston by G. A. Thompson, February 20, 1922". That remained on the bottle until I took it to this man [that is Mr. Gascoyne]. It belonged to this larger tin.

[Tag referred to is marked "C-1".]

[fol. 47] I found no tank-bottoms in this oil at either of my examinations. Nothing of that sort was found in either of my examinations. If it were it would show up instantly in the sample.

Recross-examination.

Mr. Cotter:

Exhibit 5 for identification is all right for color, Prime A. Exhibit D is all right for color, also.

Redirect examination.

Mr. French:

When I find tank-bottoms they are in containers, barrels or something else. Some look light and some dark. I should say there were no tank-bottoms in this lot [sold to Frank L. Young Company]. None of the samples in front of me contain any gurry oil. Gurry is a Menhaden oil with a heavy sour smell. Gurry oil is black, very dark. I should expect to find difference in color in A Crude Menhaden Oil; some is a little darker and some a little lighter, but it still remains Crude A Menhaden Oil in either case. I delivered to Mr. Gascoyne an average of all barrels which I examined. I did not find in any examination any oil that I would call bad, or that I could not pass as Menhaden Oil. I opened and drew a sample out of every fifth barrel or package of the 1,107 drums, or barrels, whatever you call them. They were in drums.

Recross-examination.

Mr. Cotter:

I do not understand how fish scales, bones, or fish heads could get in. I never saw anything of the sort. Have been handling oil for thirty-five years. If I did see them I would say it wasn't merchantable oil, and would not pass it. It is inferior goods, not cooked, not pressed. I would not be apt to get that from the bottom of the drums with the instrument I had. The refuse you have mentioned would not have been shown in my test, that is fish heads or a whole fish, sixteen inches long.

"X Q. 31. If you should find one fish in 1,100 barrels of oil, would you pass the oil?

A. I don't think I would. I never have found it in thirty years, and I don't know how it could get through the bunghole.

X Q. 32. How far would one fish affect the quality of 1,100 barrels of oil—assuming the fish were there?

A. I couldn't tell you."

[fol. 48] GEORGE H. MCNEAL:

Direct examination.

By Mr. French:

Our fish are caught all the way from Hatteras up to New York. The season is from the twentieth of June to the twenty-fifth of November. We fish for Menhaden, sometimes known as alewives, which is a food fish. They are caught in purse nets, and brought to our wharves at Reedsville. We unload the steamers, put elevators in and unload them. Then we cook them in a continuous cooker, with steam. They cook up pretty fine. Then they are lifted upstairs by the elevator and go through a continuing process. They are put under pretty hard pressure. The scraps fall below. The oil has to go through a process with screens with round holes and springs. What we press goes into screens and from there to the receiving tanks which lets through some of the fine matter and water and oil. It goes through one-quarter inch screen to the oil tanks. After the fish are cooked they are pressed and the oil goes down through the screen with water and some fine matter. The fine matter is mostly fish meal. The particles are small enough to go through one-quarter inch mesh, very small. It would not be possible for a whole fish to go through the screen. After the oil passes through the screen it goes down into the receiving tanks. It goes into receiving tanks first. It flows down to the receiving tanks from the pressers. That is all open. There is no chance for any fish to get in there during that part of the process. When it goes to the receiving tank we use a double tank. When we cook 300,000 we shift to the opposite side. It is in the same

trough, but we shift the gate. Then we start the flow in on this side and we pipe it up on that side and it goes into the cooking-box through three-inch pipe and is cooked thoroughly. Everything that passes through the screen goes through this three-inch pipe and from there to the cooking tank and is thoroughly cooked.

The description of the process which I have just given applies to all shipments, including this. After cooking, it is transferred to the settling-tank which is close to the cooking-tanks. We pipe it by gravity. From these tanks we pump it into the storage-tank and it is left there until we sell it. We use a steam pump of eight valves, and all the [fol. 49] oil goes through these valves on its way to the storage-tank. At the time this contract was made we were using only one storage-tank. The oil is drawn from the storage-tank into barrels, or into a tank-boat. There were no tank-bottoms in this shipment. The oil is usually heavier at the bottom of the tank. At the time we took this order, the contents of the tank were estimated at from 1,000 to 1,200 drums. We make only two kinds of fish oil: "A Crude Menhaden Oil" and what we call "gurry". The oil delivered was "A Grade Crude Oil". There is no difference between "Prime A" and "Grade A". We did not pump the tank dry, we left about six inches in it. The six inches looked like oil on the top with considerable stearin in it. We never barrel them any closer than six inches. There were no impurities in the oil. We made two shipments to fill this order. The first was on the date of the gauging,—I think the 17th—and the second, the following Wednesday,—one day between. There is a big lot of difference between gurry and "A Prime" oil in appearance. Gurry oil is very black, very high in acid. There was no gurry oil in this lot. I could not say what the temperature was the day we barreled this oil. This oil was heated up. We had to heat it up to barrel it. We heated it up to 80 or 90 degrees, something like summer heat, strong summer heat.

Cross-examination:

We have employed Mr. Thompson as a gauger for twenty-five or twenty-six years, and have at times employed Mr. Gascoyne as chemist. We have no particular brokers,

but we took orders from Reilly, Edwards at times. I never heard from anybody, at any time, that there were seventy-five barrels of bad oil, or weak oil, in this lot. I did hear somebody had said that there were seventy-five barrels of oil out of the 1,107 barrels that were weak oil. I don't remember who said so, and could not say when it was. At the time I got the message from Reilly, Edwards that Frank L. Young Company were asking that we send somebody to make a further test, we had had reported from Mr. Thompson, or from Reilly, Edwards, that there were seventy-five barrels of weak oil.

[fol. 50] I was the only manager of McNeal-Edwards Company in 1921, and had charge of the fishing boats. In 1922 we had four boats, and I superintended the overhauling of them. We had two factories at Reedsville, in 1922. I was a partner in both with my brother. As general manager I was the only one to supervise the production of oil in the McNeal-Edwards factories. We had no superintendent. We had an oil tender, whose name was Whaley. He was the one who had the actual supervision of putting this oil through the tanks, and he would know the condition of the tanks. Whaley is not here, and his deposition has not been taken. Whaley had charge of the tanks, knew the condition of them, and had charge of the other tanks that I have described. We have two settling tanks, one 18 by 20 and the other is 20, a round tank. From these tanks the oil goes to a storage-tank, of which we had two. One holds 1,200 and the other 3,000 [barrels]. The oil sent to Frank L. Young Company came from the 3,000-barrel tank. Whaley kept no records of when the storage tanks were cleaned. I attended to that part. We pumped them out, cleaned them up and washed them and skimmed them out. We cleaned them out about twice a summer. We would get some settling out of them, some solids, and they were put in a gurry tank. We never go below six inches in a storage tank. Some below that would be "Prime A Menhaden Oil". The oil is taken from the storage-tank from the top. If we get an order for less than a tank we would take it off the top. We did not keep any record of the bottoms. Nothing to show how much was in the settling-tank at the time it was drawn off to fill this order of Frank L. Young Company. When we go down and barrel with six inches the water will pull through sometimes in the pipe

and cause a great deal of trouble when it gets into the oil. When you get oil down six inches it is muddy. I cannot give you any idea of the business we did, number of barrels, etc., in 1921, without going over the records. From the settling-tank, there will be more or less settlings in the storage tank, and as each lot comes off the top of the storage-tank there is an increase of sediment accumulated from what is coming in. The amount of the sediment, as I have [fol. 51] stated, depends upon the amount of business that we did and the number of times that we cleaned out, or attempted to clean out, the storage-tanks,—sometimes once in a month and sometimes once in two months. I have no record of the number of barrels that were taken off that storage tank, during that period of 1921. The condition of the screen was left to Whaley. I did not go to Baltimore at the time the oil was shipped. When the drums were filled in our factory the temperature of the oil was from 80 to 90 degrees. We put live steam down the water through a steam pipe. Mr. Covington is connected with our concern as bookkeeper, and was when this shipment was made. He had more or less to do with the transaction, and answered all the correspondence that went on between the parties. Some letters he would write and would not call my attention to. He is still in our employ, and is not in court. I knew of no attempt to take his deposition.

Some time in the summer, possibly along July or August, we commenced to use the little tank. We cleaned it out entirely and it was quite a while before we put any more oil in into it. None was put in until the first of October.

[Witness shown Exhibit 8, which is read to the jury; see supra.]

"X Q. 1. Now with reference to that statement, 'We sold you a tank of oil and not oil on top of the tank', what does that mean?

A. Well, the oil on the top of the tank until it is heated is more limpid."

Mr. Whaley did not have anything to do with barreling it. Only running it in, and passing it up hill. I was present at the oil-tank when these various proceedings were gone through. Whatever Mr. Whaley did was under my

supervision on some occasions, but not all the time. He went on nights when I wasn't there.

Recross-examination.

By Mr. Cotter:

If any part of the system needed any repair Mr. Whaley called it to my attention, but no record was kept of the repairs. The amount of "foots" in Menhaden oil is not taken into consideration at all in determining whether it is "Prime A".

[fol. 52] X Q. 2. Well, does the amount of stearin in your opinion enter into the determination of what constitutes Prime A Menhaden Oil?

A. Well, I couldn't really say. Prime A usually goes along pretty low in acid.

X Q. 3. Well, in stearin,—would you say if a certain amount of stearin should appear in Prime A Menhaden Oil it makes no difference?

A. I wouldn't know what amount would be into it.

X Q. 4. So you leave it now that it wouldn't make any difference in your opinion whether there was 100 percent stearin,—that wouldn't affect your opinion whether it was Prime A Menhaden Oil or not?

A. I don't think it would be 100 percent.

X Q. 5. No. I say that you say it makes no difference?

A. I don't know as I say that it don't make no difference.

X Q. 6. Does it make any difference?

A. I don't suppose so, so much, but what that amount is I can't tell.

X Q. 7. You are still producing oil?

A. Yes, but I don't know the amount of stearin in the oil.

X Q. 8. You don't. You don't know the amount of foots that goes into Menhaden oil?

A. Very little foots goes into it.

X Q. 9. But can't you tell us the percentage?

A. No, I can't, honest.

X Q. 10. Over eight percent?

A. No, sir, not that much on foots, but as to stearin I don't know."

WILLIAM J. GASCOYNE, JR.:

By Mr. French:

I live in Baltimore, Maryland. I am a chemist, and have been for twenty years. I got my chemical education at Columbia University. Am connected with Gascoyne & Company. It was part of my business in January, 1922 and later, to analyze fish oil. I made a specialty of such analyses and had for a number of years. I am still engaged in that work. I know the concern of Reilly, Edwards Company, and have done work for them, and through them. My work was paid for by brokers. I made a specialty of the analysis of fish oil. I have analyzed what is known as "A Prime Crude Menhaden Oil" frequently. I should say two or three hundred shipments every fishing season, which lasts sometimes from summer until around Christmas [fol. 53] time. I am familiar with the product known as "Prime A Menhaden Fish Oil". "A Prime" and "A" to the trade mean practically the same thing. There are really no other distinctions in the way of trade names in fish oil other than "Crude Menhaden Oil" and "gurry". They are the only two commercial names. I know Mr. George A. Thompson and have known him about twenty years. On January 19, 1922, he brought specimens of Crude Menhaden Oil to analyze. He had with him a sample drawn from Reedsville and was alone. Sample was in tight tin.

"Q. 1. Will you look at either of those tins before you and see if you recognize it?

A. Yes, this [indicating] is the one. I recognize it from the label [referring to Defendant's Exhibit B]. Mr. Thompson left it there for analysis. I analyzed it for acid content and reported to Reilly, Edwards Company. Analysis showed 6.36 percent free fatty acid. I examined the sample the same day.

Q. 2. And from your experience with fish oils what would the contents of that sample be classified?

A. Prime A Crude Oil."

Later Mr. Thompson brought me another sample in two pint jars. Both were dumped into this tin [indicating Exhibit D]. I poured it myself. I filled this tin, Exhibit D,

and took from it a sample of the oil and gave it to Mr. Edwards. I analyzed that oil the same day. After I had made my examination of each of those samples, Mr. Edwards explained to me there was some trouble and I put them aside in the event of a court case of any kind.

"Q. 3. In the tins that are there?

A. Yes.

Q. 4. And they have been in your custody all the time since then?

A. Yes, sir."

The second sample was delivered to me on February 25th. I found free fatty acid content 6.54 percent. They were examined for tank-bottoms. I found none. I tested by taking some of it and dissolving it in petroleum ether.

[Witness is handed bottle, Defendant's Exhibit 8.]

I recognize the contents as tank-bottoms. The solubility test was made in Mr. Edwards' presence. He wanted to know if there were any tank-bottoms in them, and I made the experiment for tank-bottoms in his presence. There is con- [fol. 54] siderable free acid in tank-bottoms. It was not very excessive in this case. As a result of my examination of both these samples, they were "A Crude Menhaden Oil". In my opinion they are to be classified as "Crude A Menhaden Oil". All the solid fat in oil, like stearic acid and palmitic acid, are known as the stearin. They are solid fats to distinguish them from liquid fats. All fish oils contain stearin. It is a component part of fish oil, and it is absolutely necessary for it to be there. I should say that either one of these exhibits, D and C, were average samples of a shipment of fish oil. I should say Exhibit C was a pressed Menhaden oil.

"Q. 5. What would you say as to a percentage as high as 80 percent of stearin in fish oil?

A. If it were actually 80 percent of stearin in fish oil, even at the temperature of this room it would be as hard as hard butter. You could hardly press your finger through it without using force, at the temperature of this room."

The quality of the fish oil varies with the season during which the fish were caught. At some seasons of the year there will be much more stearin in fish than at others.

Cross-examination.

Mr. Cotter

I mean 80 percent by weight. Melting point of stearin is about 60 or 65 degrees Fahrenheit. If there was 80 percent stearin and the oil was heated to a temperature of between 80 and 90 there is no question but that it would flow freely. I am only vaguely familiar with the process of pressing oil.

Assuming that the process was functioning properly, and the strainer was in perfect condition, and the temperature was the proper temperature, and that less than one-fourth of that oil came out after the regulation time for the seeping process, assuming all these things, you would still have to do some assuming, namely, that 75 percent would have to be pure caked stearin before there would be any indication that it was not "Prime A Crude Menhaden Oil". I don't understand that press bags are used before the straining process. My understanding of winter pressed oil is that they would congeal it down to a certain temperature, which I thought was 30 or 40, and after it became congealed they would then put it in these press bags and press out the oil. I know what [fol. 55] the "graining process" is. I do not know whether after that it goes into the strainer in order to hold these particles that have been separated and, permit the liquid that had been separated to run through.

I never met Mr. Lee, the plaintiff's superintendent, until I saw him in the court-room. I have been examining for McNeal-Edwards for twenty years. There may have been twenty examinations in the course of a year. I know Mr. Thompson. He and I live in Baltimore, and are friends. I am still analyzing for Mr. McNeal.

"X Q. 6. Prime A Oil in your opinion should not contain more than five to eight percent of foots, should it?

A. It depends upon the temperature.

X Q. 7. Have you any opinion about it?

A. It would depend upon the temperature. At what temperature are you talking?

X Q. 7a. Well, say 55 to 60 degrees.

A. And by stearin you mean what will settle down in the bottle?

X Q. 8. By foots? That is what you mean by foots?

A. Yes. At 55 it is pretty hard to say because oil will vary so. I have seen oils at 55 degrees that will remain congealed at that temperature.

X Q. 9. You haven't any opinion as to what the amount in percentage of foots is in Prime A Menhaden Oil?

A. No; as I say, there are too many considerations upon which that rests."

Exhibit D was filled from two bottles,—two pint jars. They were shaken up well and one bottle was filled for Mr. Edwards. I kept my half right in this tin. The label was on one of the jars. I removed it from the jar and put it on the tin. I drew some out for the analysis and left what remained in the large can. It was just a test to see if there was any insoluble matter. There was none. I took 25 to 50 grams to make that test. The remainder was left in the can. I did not have to pour the entire can contents out into the glass vessel.

"X Q. 10. Did you put these two (Exhibits D and C) into these vessels yesterday, since you came to Boston?

A. This morning Mr. Thompson and I filed them on the [fol. 56] back bench there [indicating the spectator's seats]. I have made no test of either of those for the purpose of determining free fatty acid, since my original analysis. The amount of acid does not increase with the lapse of time unless there is some fish body left there to decompose. First test for acid was 6.36 and the second was 6.54. There was an increase in a month, and was within reasonable limits. I would say that both samples were good deliveries of Crude Oil. *I would say that both samples were good deliveries of Crude Oil.* There is a shade of difference in color; Exhibit C is somewhat darker than Exhibit D. I would say they are very similar, except for the slight difference in color."

Redirect-examination.

By Mr. French:

These cans, referring to the exhibits, remained in my possession unopened from the time I completed my second examination to this morning. They were opened in my presence this morning after being thoroughly shaken. I tested one of them, and there were no solid particles in it. Tank-bottoms are more visible in Crude Oil than stearin.

Recross-examination.

Mr. Cotter:

Stearin is desirable for some purposes. For pressed oil purposes, the less stearin the better for pressing.

Redirect examination.

By Mr. French:

Stearic acid is a component part of what is known as stearin. There is no routine method for analyzing and getting the stearin content of fish oil.

Recross-examination.

By Mr. Cotter:

Mr. Edwards did not, at any time in the month of June, 1922, turn over to me any samples with reference to this matter, that I recall. These are the only two that I had, that I recall. Reilly, Edwards paid me for my services.

HAROLD W. YOUNG (rebuttal):

Direct examination.

By Mr. Leach:

I was connected with Frank L. Young Company in 1922, and am now connected with Cook, Swan & Young. I had a talk with Mr. Thompson in 1926, in Baltimore. Think it was February or March. He said that he had examined a lot of 1,107 drums in Baltimore—I understood him to say in Baltimore—by examining one out of five, and out of that [fol. 57] one out of five, found seventy-five or eighty of them that should not be shipped as oil, and that he had reported that to Reilly of Reilly, Edwards.

[It is agreed that the physical exhibits introduced into evidence may be used at the arguments in the Circuit Court of Appeals.]

The drums in which the oil was shipped were attached by Frank L. Young Company in the suit originally brought in

the Superior Court for Suffolk County on September 15, 1922, and remained under this attachment until February 28, 1927. They were attached in the present suit of Frank L. Young Company v. McNeal-Edwards Company on February 25, 1927, and still remain subject to this attachment.

[The correspondence annexed to this bill and marked "Exhibits A to 1" took place between the parties in regard to the drums.]

At the close of the testimony the defendant submitted to the court the following requests for rulings:

DEFENDANT'S REQUESTS FOR RULINGS

1. Upon all the evidence your verdict must be for the defendant, McNeal-Edwards Company.

2. Upon all the evidence, Frank L. Young Company was bound, within a reasonable time, either (1) to refuse to accept the oil, and return it and the drums in which it was shipped to McNeal-Edwards Company, or (2) to accept the oil and return the drums.

3. Upon all the evidence, the plaintiff accepted the oil delivered under the contract in suit.

* * * * * * *

5. There is no evidence that the plaintiff "made known" to the defendant the purpose for which the oil delivered under the contract was to be used, and the plaintiff cannot recover under the third count of its declaration.

6. That where a person owes a duty to do an act by virtue of the obligation placed upon him by a valid contract, he has no right to knowingly do another act which will make it impossible for him to fullfil that obligation. To apply this to the case at bar Frank L. Young Company, owing a duty to [fol. 58] return the drums promptly, had no right by their intentional act to cause the drums to be placed in custodia legis, that is, under attachment, and to claim that they were therefore unable to so return them to McNeal-Edwards Company.

7. To so place them under attachment as described in the foregoing request, and to still retain them, constitutes a breach of the contract in suit, and your verdict must be for the defendant.

The court refused to give said requests numbered 1, 3, 5, 6 and 7, and the defendant duly excepted.

CHARGE TO JURY

The court charged the jury as follows:

MR. FOREMAN AND GENTLEMEN: I am going to send this case to you at first on special questions, as I told you. You will have a set of questions as to each case. That is, in the case of the Young Company against McNeal-Edwards Company and the case of McNeal-Edwards against the Young Company. You will find these questions are so put, Mr. Foreman, that you can answer yes or no; and the jury is to agree upon an answer to each question. Having done that, you will write in the answer yes or no, and having completed the answer you will sign the finding in each case, just as you agree.

Now, let me take up what we call the first case, the Young Company agaist McNeal-Edwards Company. The questions which you are to answer are, first, was the oil delivered by the McNeal-Edwards Company to Frank L. Young Company of the quality and grade called for by the contract sued upon. You will answer that, that it was or that it wasn't. If you find that it was, you need not consider the second question, which relates to damages and which reads as follows:

"If not what is the amount of the damage sustained by the Frank L. Young Company by reason of the inferiority in the quality of the oil?"

That calls for an answer in dollars and cents, but you need not answer that question if you are satisfied a good delivery was made nor unless the plaintiff has satisfied you that a good delivery was not made.

[fol. 59] Now, the question which you will meet here is obviously a pure question of fact. You have a situation

perfectly common, where one person has sold and another person has bought a certain common commodity by description in the sale note, and the parties are in disagreement whether what was delivered conformed in grade and quantity with what the contract called for. I know of no way I may assist you better than to give you a bird's-eye view of the evidence on that question. Counsel stressed different parts of the testimony, naturally, and I will try to run over in very brief, and perhaps in an inadequate way, but enough so as to recall to your mind the witnesses and the general character of the testimony, not the details. Now, the contract was for "Prime A Crude Menhaden Fish Oil". That is what that called for. And there is no doubt the McNeal, Edwards Company sent forward to Boston some 1,107 drums of what it said was that sort of oil; and those drums were received by the Young Company and the contents were regarded by the Young Company as not being Prime A Crude Menhaden Fish Oil.

The first of the witnesses was Mr. Lee, who was the superintendent at this time of the Young Company, and he said that this was a whitish, thick, pasty stuff, which would not flow as freely as Grade A Menhaden Oil should flow, and, that it took on the average a half hour to empty a drum when the drum ought to have freed itself in five to ten minutes. He says there were large lumps in it, fish heads and one whole fish, a Menhaden fish. He said that the oil when put into the factory wouldn't process properly; that it cost instead of two cents, which was the average cost of processing, about 10 to 12 cents a gallon to process this oil, and that the delivery was not a delivery of oil according to the contract requirements.

The next witness for the plaintiff was Mr. Sears, who was an oldish man, a workman, who worked in their chilling room; and he said he had worked there a good many years, thirty-five or more; that, as he first saw this oil, it seemed to be much the same as any other oil, but it did not process like other oils, and that when he came to drain it the residue was much greater than it ought to be. As I remember it [fol. 60] he said that about three-quarters ought to drain away of what was put in the bag, and in this case only one-quart of what was put in the bag or less drained away; and that it would not drain when filled, so that it could not be well separated, the stearin from the liquid oil. When it

had water in it, it made it sloppy, and after it had been through the press, instead of being a hard, firm and greasy cake, the residue was slimy and soft. So, Sears said it was not what he understood by this Grade A of oil.

Schutt was the next witness, a working man, a smaller man. He also said he had been thirty-five or thirty-six years at work in this plant; that this oil would not dump right. He worked on it apparently before Sears did. They had trouble in getting it out of the barrel and, as Schutt said, it was a dirty lot and took half an hour to dump the drum; that it was slimy and left no cake after they had pressed it; and he said he had never seen anything like it in the way of Menhaden oil.

Then Mr. Percy Young said it was very thick; that it had practically no free oil; that the foots were eighty percent instead of about eight percent, and that it was not Prime A delivery. He said the oil which was delivered was worth about 17 to 18 cents instead of about 33 cents, which we may assume was the price of Grade A, because that was the price at which the parties traded.

The next witness was Rounsevell, who had been employed by the plant in New Bedford and had come up to Boston while this oil was being handled there; and he said he saw a certain number of barrels, I think in round figures fifty, it may be more or less, that had water in it and had waste in it. It was so thick and slimy it did not separate well in the processing, and it was not in his opinion a good delivery of Grade A.

The last witness for the plaintiff was Mr. Murphy, who said he had been forty odd years connected with them. He found fault with this delivery because it was very thick, because it had an excess of foots, and he said there were what looked to him tank-bottoms in it. He thought the oil, instead of being a good delivery of Grade A, was an [fol. 61] odd lot outside of all the trade designations, and he thought it was worth about 17 or 18 cents.

That was the case in the outline submitted to you by the plaintiff in the principal case, on which they ask you to return a verdict as you have observed for about $9,600 in damages, being the difference in the value of the oil delivered and the kind of oil which the contract called for.

On the other side a very different picture was given you. Mr. Thompson was their first main witness. He lives down

in Baltimore, or near there, and is a sampler and grader of oils, and has been in that business many years; and he is a State officer, very much as a wood-measurer is a sworn officer with us, or a weigher is a sworn officer. The Commonwealth has those sorts of men under oath to perform an every-day job honestly. He says he was called down to the McNeal, Edwards plant at Reedville, Virginia, and went through in a cursory way this lot of oil; that he examined one in five of the 1,107 drums, and he did so before it was sent north. That was on January 16, and he thought there were perhaps 75 barrels that were heavy and thick. He didn't leave it entirely clear whether that was 75 out of the 220 he examined, or whether from his examination he thought there were 75 in the whole lot. His statement was not clear on that either way. It would make quite a little difference whether you say there were 75 barrels out of 1,100, or whether you say there were 375 out of 1,100. He regarded the oil as a proper Grade A Oil with the exception of 75 drums that he regarded as heavy. He didn't say those were out of the grade, but they were rather heavier than is customary. Then, after the dispute between the parties developed Mr. Thompson came at the suggestion and the expense of the broker and made a complete examination of this oil at the plant of the plaintiff in South Boston, sampling each of the 1,100 drums and making out of those samples about six gallons that had been drawn, and then cutting that down and averaging it so that finally he took from it three pint jars, which he says was a fair average sample of the lot. He left one of these jars with the Young Company and he took two of them with him down to [fol. 62] Gascoyne at Baltimore and turned those over to Gascoyne. Mr. Thompson says that while there were 70 or 75 barrels of thick or weak oil, he regarded the shipment as a whole as a proper delivery of Grade A Crude Menhaden. He said that he couldn't think of passing as Grade A a delivery which had heads and dirt in it; that he had never seen anything of that sort tendered as a delivery. So you see really there isn't so much question there about this standard which you are to apply. But, pressed a little further about his idea of the standard, Mr. Thompson expressed views radically different from those which had been expressed by the witnesses called by the plaintiff, upon this very important point of the essential qualities of a

Grade A. Mr. Thompson expressed the view that the Grade A Oil had no relation to anything except color, sweetness and presence of water and the presence of tank-bottoms, and that an excess of foots even to any amount was not a matter which was to be taken into consideration in the grading—a very different position, you observe, as to the meaning of Grade A from that taken by the witnesses for the plaintiff. It is put to you by the other side that Mr. Thompson's experience has not been so much in the grading of oil completely as in certain other dealings with it largely on matters of gauging and that sort of thing.

The next witness in the logical order—I am taking him out of order in the case—was Mr. Gascoyne of Baltimore, the chemist, who told you that Mr. Thompson came to him with these two pint bottles or jars of samples, the other jar having been left with the Young Company in Boston; Thompson turned over these two pint jars to Mr. Gascoyne, so Gascoyne says. Gascoyne says he examined it; and he has produced here the identical stuff that Thompson turned over to him, which is the stuff that is in one of these two bottles that had the darker color. The other one of those comes from a can which I understand is said to represent the shipment on the original sample. Mr. Gascoyne told you that one of these samples is part of the identical sample drawn by Thompson in February, 1922, in Boston and delivered by Thompson to him and turned by him into that [fol. 63] tin can next to the stenographer, from which it was taken and put into this bottle. Mr. Gascoyne expresses the opinion that the oil in that bottle is a good delivery of Grade A Crude Menhaden.

Then the next witness was Mr. McNeal, the manager and responsible head, apparently, of the McNeal, Edwards Company, the defendant in the first case. He described to you rapidly the way in which this Menhaden oil is made, about the fish being caught and being brought into the oil works and what was done to them afterwards. The gist of it was that the fish were put into the cooking tank and cooked— that broke up the flesh, I suppose and from that time they were handled by machinery through presses and so forth, and the oil was squeezed out of them and then drained through a rather coarse strainer to a tank. There was a separating tank or a settling tank, and a chilling tank, and finally perhaps a receiving tank. The exact steps

there are not very important. The gist of them is that from the presses where the oil is squeezed out it is strained and then handled through two-inch pipes and inch and a half pipes and, finally, a one-inch pipe, being handled by pumps. And it is put to you that the method of handling utterly refutes and makes impossible any such impurities as the plaintiff says existed in this shipment; that you can't pump a Menhaden through a pump, or run it through an inch and a half pipe, and still less an inch pipe. He says there were no impurities in the oil, that it was all handled in that way and was a good delivery. He did say that it was pumped out of the tank and the delivery comprised all the oil in the tank; that they left, however, about six inches in the bottom of the tank as "settling". He also said that it being winter the oil was heated artificially, I understand, so it would flow readily when they were barreling. The oil was then,—to follow it through,—put into the barrels, he says, and shipped north.

Now, that is in a very cursory way the evidence on both sides about this crucial question. The evidence is clearly contradictory as you observe. One way of deciding where the truth lies is to begin by seeing what facts are either agreed or are not seriously in dispute. Here you are faced at the outset, as I have said, with a disagreement as to the [fol. 64] standards of grading. The plaintiffs regard Grade A as meaning obviously an oil which is freer from non-oleaginous substance, or which must contain in other words a greater volume of free liquid oil than the defendant does. And you must decide that question on the evidence, accepting one view or the other. It is to be said that Thompson and Gascoyne both adhere to the standard grading maintained by them, that is, in substance that the presence of foots had nothing to do with grading. So what is the standard? Who is right about it? Mr. Gascoyne says that if you got 80 percent of foots the oil would be almost as hard as butter. It is evident, I think, gentlemen, that somewhere, dealing with oil, you must reach a point where there would be so much of this stearin or foots in it that the more reasonable view would be that it was not a delivery of oil. But that is a question as to which you are absolutely and finally the judges on the evidence here.

Again, it appears that this oil was admittedly the last of the season's run. The amount in the sale note is indefinite

—1,000 to 1,200 barrels, and it is said by the parties that that is because they understood the McNeal, Edwards Company was selling what it had left and was uncertain just what the amount would be. And that perhaps opens the door to a suspicion that in pumping out the last of the tank a good deal of the heavier stuff might get worked over without anybody being greatly at fault. Of course we are not balancing or charging faults here. We are trying to decide whether the oil delivered was Grade A Crude Menhaden. We are not concerned with blameworthiness in the least. It is an up and down question, whether the contract was complied with.

Then, again, there may have been some misapprehension with regard to the delivery. Covington in his letter certainly appears to have been under a misapprehension when he speaks about the contract as being for the oil that was in the tank, and that "you are buying the residue of the tank". That is not so. The contract was for 1,000 or 1,200 barrels Grade A Crude Menhaden, and it was warranted to be, all of it was warranted to be, of the grade stated. Some of the evidence of the Young Company might well be [fol. 65] put to you as drawing a pretty long bow. Someone has to exercise a good deal of ingenuity as to how a Menhaden fish can get into a steel drum and get out again; as well as fish heads. And one has to consider also the absence of the sample,—a very curious thing that. The parties know they have a dispute. A man comes up from Baltimore and draws a sample and leaves it with them; and it is not produced. I think you would be well justified in accepting these samples here in view of there being nothing to contradict them. If you do accept them, this sample was just like what was left with the Young Company by Thompson. I think you may well pay some attention to that sample. You and I don't know very much about Menhaden oil; but it is put to you that that sample certainly has stood before us for a couple of days and shows no great inclination to settle into very clear oil. It may be that the real dispute between these parties is nothing that involves anyone's truthfulness and honor, as much as it does as to how much stearin or foots is fairly permissible in a commercial Menhaden oil. It may be that what happened was that they were pumping out the tank and a great deal more than

usual of this stearin got into the oil and perhaps a little of tank-bottom, more or less of the tank-bottom, got into it. It would seem hard to imagine that people like Schutt and Sears and Rounsevell are lying about it when they say this oil was congealed stuff when they saw it in January and would not run. And it may be that that is the issue which you will find the determining issue in the case. I don't mean to state that that is my opinion, still less to impose it upon you. I am just suggesting it as a view of the case which you may possibly take.

If you think the delivery was a good delivery just say so and pass by the question of damage, Mr. Foreman. If you think it wasn't, you will have to come to the question of damages. Now, the damages would be the difference between the value of the goods delivered, that is, the value of this lot of goods and the value of the goods if they had been what the contract called for. In other words, if we assume that the contract price of this oil was the market value at [fol. 66] the time and place of sale which is a fair enough assumption, nothing here to contradict it, then the value of Prime A Crude Menhaden was about 33 cents; and if you are prepared to accept the testimony of Percy Young and Lee, the value of the oil at that time was 17 or 18 cents, making a difference of 16 or 17 cents a gallon which the Young Company lost by reason of the delivery of oil of an inferior grade instead of what had been agreed upon. That works out in money on 60,700 gallons, at some $9,600 or $9,700. Eleven hundred and seven drums of 55 gallons each come to 60,885 gallons, and at 16 cents that comes to something like $9,741. Whatever figure you take,—and you will naturally say that when Mr. Young and Mr. Murphy tell you that this oil they got was only worth 16 or 17 cents they are not overstating the value of it,—whatever you think the allowance will be, you will apply that in money, and then add interest on that amount from March 6, 1922, and that will be your damages.

Let us turn now to the next case—the McNeal, Edwards Company against the Young Company. I think, gentlemen, this is a very good time to stop for the day. It is not quite four o'clock. I will leave the charge open and instruct you about the residue of the case tomorrow morning at ten o'clock.

[Adjourned at 3.50 p. m. to be resumed Friday, February 10, at 10 a. m.]

Friday, February 10, 1928—10 a. m.

The COURT: Mr. Foreman and gentlemen: Yesterday afternoon I finished what I had to say to you about the special issues in the Young Company v. McNeal, Edwards Company, and I now come to the special issues in the second case of McNeal, Edwards Company v. Young Company.

The questions are simple enough and I think you will understand them without much explanation except perhaps as to the first. The first question is: Was the retention of the drums by Frank L. Young Company from the time they were received, about the 25th of January, 1922, to the 15th [fol. 67] of September, 1922, when they were attached, an unreasonably long retention of them? You will say whether it was or wasn't.

You may want to know what is meant by the expression "unreasonable long retention of the drums". Here was a contract by which the Young Company was buying down in Baltimore, Maryland, oil which had to be shipped up either in tanks or containers. The method provided in the contract was to ship in containers, in drums. Of course, some arrangement had to be made about the drums, either they were to be bought as part of the oil, or they were to remain as the property of the seller and be returned to the seller. The latter was the arrangement upon which the parties agreed. The oil is to be furnished in drums and the drums are to be returned to the seller, freight prepaid—that is the contract for the drums.

So that your property, Mr. Foreman, is coming forward to me in your drums, and I have agreed after I run the oil out to return the drums to you. The contract doesn't say how long I shall keep the drums, but the law fills that gap in the contract saying that I may keep those drums a reasonable time to enable me to carry out the contract which you and I made between us.

Now, how are you to decide what a reasonable time was. Well, you are to decide it in view of the circumstances in this particular transaction. The facts that a dispute arose

immediately upon inspection of the oil, and that under those circumstances it certainly would be a reasonable thing for the buyer to call its opinion of the inferior quality of the oil to the attention of the seller before the oil was emptied, and at least to give the seller an opportunity to inspect it in the drums—that would seem, too, a reasonable view. Once the oil was emptied out of the drums the door would be opened for argument as to whether it had been changed or mixed, which would not exist if the seller had inspected the drums in the original shipment. So, I think we will all agree that the retention of the drums for a certain time for that purpose was plainly reasonable.

Now, how long would that last. Thompson came up in February and made at the request of the broker, Reilly-[fol. 68] Edwards, a second sampling of the oil; and he left for the south in the latter part of February, the 22d or the 23d, having left a sample here with the Young Company. There was more or less correspondence between the parties, less rather than more, but there can be no doubt, I imagine, that the McNeal, Edwards Company understood that this oil was very much objected to on quality and grade by the Young Company. They knew certainly in the summer of 1922 that the oil was still in the drums, being held there. It was so stated in the letter of July, 1922, in which they hoped that the McNeal, Edwards Company would again send somebody up to check over the quality of it.

Another reason given by the Young Company for not emptying the drums and sending them back sooner is that the oil wouldn't run in cold weather; that it really couldn't be handled. Well, you run into a conflict between the parties as to the character of the oil in the proper grade. The plaintiff's witnesses, Lee at least, and some of the others I think, said that Prime A Crude Menhaden would run in cold weather; that a barrel would empty in perhaps five to ten minutes in cold weather. There is no testimony on that point as far as I recall from the witnesses who testified for the McNeal, Edwards Company. The men who tried to handle the oil up here said it would not run in cold weather; and looking at those samples there, one of which seems to be pretty solid, one may wonder—I pass the question absolutely to you—whether that would run if it was chilled to 30 or 32 degrees. I see it at 70 degrees here in the court, I suppose. The testimony of the McNeal, Edwards Com-

pany was that they had to heat the oil and did heat it by steam in order to fill it in the barrels. You will remember the evidence, no doubt, pro and con on this point. The significance of it in this question is that one of the reasons advanced by the Young Company for retaining these barrels such a long time was that they retained them because they had to keep them until warm weather, until the oil would soften up and melt enough to run out of the barrels. They said they did that some time in August. They said they did it in the heat of the summer and the barrels re- [fol. 69] mained around until the 15th of September, simply waiting the return shipment to the seller.

On the 15th of September the situation was evidently regarded by the Young Company as such that they instituted proceedings by attaching these barrels in their possession as the property of the McNeal, Edwards Company. Of course that puts them into the custody of an officer of the law, and from that time we are not concerned with the Young Company's failure to return them, because they were apparently out of it. The drums being in the custody of the law, of course it was beyond the power of the Young Company to return them, and their failure to do so stands as excused by operation of law.

So, the question which you are to answer is as to the reasonableness of the Young Company's contract in holding on to the drums until September 15. If you think that they ought to have emptied those drums and shipped them back sooner, then you will say there was an unreasonable long retention of them, and you would answer that question in the affirmative,—that the retention was unreasonable. If you think on the whole they were justified to hold them until September 15 you will say no. If you say there was an unreasonable retention of the drums, the next question is how much that damaged in dollars and cents the McNeal, Edwards Company,—that is, damage for the use of the drums while they were retained.

There isn't much evidence to go on. Nobody has said what the monthly rent or the yearly use of the drums was worth. You have been told what they cost when new. You have had very conflicting evidence of the value of these drums, and if you come to that question you will have to use your common sense and do the best you can as to the amount of money involved. If you come to the matter of damages

for unreasonable retention, it is not the value of the drums at all but just the value of the detention, what we call in the admiralty court "demurrage" on the drums.

And the last question is what was the fair value of the drums on the date of attachment, September 15, 1922. I am [fol. 70] asking you to state that value because that may become important in a certain aspect of the case. It means the fair value of the drums as they then were. Upon that, Mr. Sullivan said that they were worth 75 cents and he thought they were a pretty poor lot. Mr. McNeal said they were worth $3.50, and Mr. Lee, or perhaps Mr. Murphy, said they were worth 75 cents. Mr. McNeal said they were a lot of drums in good condition. He won't say that they hadn't been used before; but they were, he says, in good condition and had cost $4, which was the market for new drums at that time. On the other side, it was said that they were "one-trip" drums anyway, and that they had done a good many more than one trip. Sullivan said that they were scaled and rusted and he thought 75 cents was all they were worth. You have to make up your mind what the fair value is and when you have answered the question just sign those and come back with the answer.

The Court: I omitted to say one thing that concerns the burden of proof. I am very properly reminded of it by counsel. Let us take the first case—the Young Company. "Was the oil delivered by McNeal, Edwards Company to Frank L. Young Company of the quality and grade called for on the contract sued upon?"—the Young Company, suing for a breach of warranty here, undertakes to prove to you by a fair preponderance of evidence that the oil was not of the quality and grade called for by the contract. They don't undertake to prove it beyond a reasonable doubt or anything of that sort; but they must satisfy you that it is distinctly probable that the oil was not of the quality or grade called for, or you should answer that question that the oil was of the grade called for.

As to damages, damages must be proved in the same way by a fair preponderance of the evidence. The mere assertion that a thing is worth a million dollars is no evidence that it is. The proof must carry it up to the point of value.

And in the same way as to the retention of the drums.

The McNeal, Edwards Company is asserting they were re-
[fol. 71] tained an unreasonable time. That must be proved —they must prove that the retention was unreasonable by a fair preponderance of the evidence; and that principle applies to the other question. Of course it follows that if your mind is left absolutely in doubt about any question you do not find in the affirmative on that question.

SPECIAL QUESTIONS TO JURY

The following special questions were put by the court to the jury, and answered by them as follows:

"1. Was the oil delivered by McNeal-Edwards Company to Frank L. Young Company of the quality and grade called for by the contract sued upon?"

To this the jury answered, "No."

"2. If not, what is the amount of the damages sustained by the Frank L. Young Company by reason of the inferiority of the quality or grade of the oil delivered?"

To this question the jury answered, "$10,730.17."

The jury returned a verdict for the plaintiff in the sum of $10,730.17.

The following special questions were put by the court to the jury in the case of McNeal-Edwards Company v. Frank L. Young Company, tried with this case and were answered by them as follows:

"1. Was the retention of the drums by Frank L. Young Company, from the time when they were received (about January 28, 1922) to 15 September, 1922, when they were attached, an unreasonably long detention of them?"

A. "Yes."

"2. If the jury answers the foregoing question in the affirmative, what money damage did McNeal-Edwards Company sustain because of the unreasonable detention of the drums by Frank L. Young Company?"

A. "$100."

"3. What was the fair value of the drums on September 15, 1922?"

A. "$1384."

Subsequent to the rendition of the verdicts as aforesaid, [fol. 72] and before the entry of judgment, the defendant filed the following motion in arrest of judgment:

MOTION IN ARREST OF JUDGMENT

"Now comes the defendant in the above-entitled cause, after verdict, and, appearing specially, moves that judgment therein be arrested on the grounds—

1. That it appears upon the record that this court has never acquired jurisdiction of this defendant.

2. That it appears upon the record that the service made upon the defendant's attorney was void and of no effect;

3. That it appears upon the record that the District of Massachusetts is not the proper venue for hearing and determining said cause; and

4. That the alternate, or conditional, verdict rendered by the jury, at the request or direction of the court, was a violation of the defendant's right to that trial by jury secured to it by the Seventh amendment to the Constitution of the United States."

The court overruled the motion, and the defendant duly excepted.

The defendant, being aggrieved by said verdicts and by said refusals to rule, brings this bill of exceptions and prays that the same be allowed.

McNeal-Edwards Company, by Its Attorney, Asa P. French, Appearing Specially. Clarence S. Towles, of Counsel.

ORDER ALLOWING BILL OF EXCEPTIONS

July 6, 1928.

The foregoing bill of exceptions is allowed.

James M. Morton, Jr., U. S. District Judge.

[MEMORANDUM.—Copy of defendant's answer and defendant's plea in abatement as amended marked respec-

tively "A" and "B" are here omitted as they already form part of this Transcript of Record and will be found printed on pages 9-11, 13 of this volume. James S. Allen, Clerk.]

[fol. 73] EXHIBIT "C"

UNITED STATES DISTRICT COURT

Docket No. 2054

Law Docket

Title of Case

FRANK L. YOUNG COMPANY

v.

THE McNEAL EDWARDS CO.

December Term, 1926.

Attorneys, Warner, Stackpole & Bradlee, E. Barton Chapin, 84 State St., Boston; Richard J. Cotter, for Plaintiff. Asa P. French (specially Jonathan W. French) for defendant.

Date			Filings—Proceedings
Month	Day	Year	
Jan.	2,	1923.	Entered by defendant: Record of State Court filed and entered. (1) Writ (2) Declaration (3) Motion (4) Order of Notice, (5) Special Appearance, (6) Petition for Removal, (7) Affidavit of Notice, (8) Bond on Removal, (9) Docket entries.
	5,		Appearance of Asa P. French and Jonathan W. French, Specially for defendant, filed.
	5,		Answer filed.
Aug.	9,		Appearance of Warner, Stackpole & Bradlee and E. Barton Chapin for plaintiff filed.
Sept.	27,	1923.	Appearance of Richard J. Cotter for plaintiff filed.
Feb.	16,	1924.	Plaintiff's motion for continuance filed.
	16,		Affidavit in support of continuance filed.
Sept.	15,	1925.	Agreement for marking case for trial calendar for Sept. T. 1925, filed.
Feb.	28,	1927.	Discontinuance filed.

[fol. 74] EXHIBIT "D"

UNITED STATES DISTRICT COURT

Docket No. 2071

Law Docket

Title of Case

McNEAL EDWARDS COMPANY

v.

FRANK L. YOUNG COMPANY et al.

March Term 1928.

Attorneys: Asa P. French, Jonathan W. French for Plaintiff. Richard J. Cotter, Warner, Stackpole & Bradlee for Defendant.

Date (Month Day Year)	Filings—Proceedings
Mch. 20, 1923.	Writ filed.
20,	Declaration filed.
20,	Appearance of Asa P. French and Jonathan W. French for Plaintiff, filed.
Apr. 9, 1923.	Appearance of Richard J. Cotter and Warner, Stackpole & Bradlee for defendant, filed.
9,	Answer filed.
Sept. 15, 1925.	Agreement for marking case for trial calendar for Sept. Term, 1925, filed.
Dec. 14, 1926.	Motion that case be added to trial list for Dec. Term, 1926, assented to, filed.
Feb. 21, 1927.	Defendant's motion for specifications filed.
23,	Affidavit of notice filed.
28,	Brewster, J. On defendant's motion for specifications, no one appearing in opposition, motion granted, 21 days being allowed for the filing of the specifications and 5 days more thereafter to enter a new cross-action. (entered).
Mar. 18,	Plaintiff's specifications filed.
Feb. 7, 1928.	Morton, J. Jury trial begins, jury impanelled, Charles Bailey, Foreman, adjourned to Feb. 8, 1928 (entered).

[fol. 75]

Date			Filings—Proceedings
Month	Day	Year	
Feb.	8,	1928.	Morton, J. Jury trial continues; adjourned to Feb. 9, 1928 (entered).
	9,		Morton, J. Jury trial continues; adjourned to Feb. 10, 1928 (entered).
	10,		Morton, J. Jury trial continues; committed to jury; special findings by jury; alternative verdict for plaintiff in the sum of $100; time for filing bill of exceptions on each side extended 60 days from date of verdict. Verdict filed (entered). Case tried with Law No. 3021.
June	25,	1928.	Morton, J. Judgment on the verdict for plaintiff in the sum of $100 damages and $2.50 interest; judgment entered on the last day of the term under general order of court pursuant to Rule 51 (entered).

EXHIBIT "E"

United States District Court

Docket No. 3021

Law Docket

Title of Case

FRANK L. YOUNG CO.

v.

MCNEAL EDWARDS CO.

Attorneys: Warner, Stackpole & Bradlee, W. B. Leach, Jr. 84 State St., Boston for Plaintiff. Asa P. French, Specially 45 Milk St., Boston for Defendant.

Date			Filings—Proceedings
Month	Day	Year	
Feb.	21,	1927.	Motion for special precept filed.
	21,		Lowell, J. Motion allowed, special precept to issue as prayed for (entered).

Date			Filings—Proceedings
Month	Day	Year	
Feb.	23,		Special precept issued.
Mar.	3,		Special precept served by Marshal Feb. 25, 1927, filed.

[fol. 76]

Mar.	22,	1927.	Writ entered late by order of court.
	22,		Declaration filed.
	23,		Special appearance of Asa P. French for defendant filed.
	24,		Defendant's motion to dismiss filed.
	24,		Plea in abatement filed.
	30,		Affidavit of notice filed.
Apr.	4,		Defendant's motion to amend its plea in abatement filed.
	4,		Plaintiff's motion to add case to March Term Jury Trial List filed.
	5,		Certificate of notice filed.
	11,		Lowell, J. Heard on defendant's motion to dismiss, taken under advisement; replication to plea in abatement filed.
	21,		Lowell, J. Memorandum on motion to dismiss;—Motion denied. Memo. filed (entered).
	22,		Answer filed.
	23,		Defendant's claim of exception filed.
	26,		Plaintiff's motion to put case on trial list filed.
	27,		Defendant's claim of exception filed.
	27,		Lowell, J. Further Memorandum on plea in abatement:—Plea overruled (entered as of April 26). Memo. filed.
	29,		Defendant's motion to extend time for filing its bill of exceptions, assented to, filed.
Apr.	29,	1927.	Lowell, J. Motion allowed and time for filing bill of exceptions to order denying motion to dismiss and overruling plea in abatement extended to and including twenty days after the verdict shall be rendered (entered).

Date			Filings—Proceedings
Month	Day	Year	
May	2,		Lowell, J. Heard on plaintiff's motion to put case on trial list; motion denied (entered).
Feb.	7,	1928.	Morton, J. Jury trial begins; jury empanelled, Charles Bailey, Foreman; adjourned to Feb. 8, 1928. (entered).
[fol. 77]			
Feb.	8,	1928.	Morton, J. Jury trial continues; adjourned to Feb. 9, 1928 (entered).
	9,		Morton, J. Jury trial continued; adjourned to Feb. 10, 1928 (entered).
	10,		Morton, J. Jury trial continues; committed to jury; special findings by the jury; alternative verdict for plaintiff in the sum of $10,730.17; time for filing bill of exceptions on each side extended 60 days from date of verdict. Verdict filed (entered) (tried with Law No. 2071).
	14,		Defendant's motion for a new trial filed.
	14,		Defendant's motion in arrest of judgment filed.
	27,		Defendant's motion for extension of time for filing interlocutory bill of exceptions filed.
	27,		Morton, J. Motion allowed, time for filing exceptions to order overruling plea in abatement extended until time for filing exceptions to verdict expires (entered).
Apr.	9,		Morton, J. Defendant's motion in arrest of judgment denied, exception saved (entered).
	9,		Defendant's bill of exceptions filed.

EXHIBIT "F"

DISTRICT COURT OF THE UNITED STATES, DISTRICT OF MASSACHUSETTS

No. 2071

McNEAL-EDWARDS COMPANY

v.

FRANK L. YOUNG COMPANY

Plaintiff's Declaration

First Count (in contract). And the plaintiff says that on or about the third day of January, 122, it sold to the defendant eleven hundred and seven (1107) barrels of Prime "A" Crude Menhaden Fish Oil, and shipped the same from its plant in Reedville, Virginia, to the defendant at Boston, in containers known to the trade as drums; that it was a part of the defendant's obligation under the contract for said sale forthwith to remove the oil from said drums and [fol. 78] to return the latter, freight prepaid, to the plaintiff at said Reedville; but the plaintiff has refused and neglected and still refuses and neglects to return said drums to the plaintiff as aforesaid to the great damage of the plaintiff as set forth in its writ.

Second Count (in tort). And the plaintiff says that on or about the twenty-third day of July, 1922, the defendant wrongfully converted to its own use eleven hundred and seven (1107) containers or drums of the value of three dollars and fifty cents ($3.50) each, belonging to the plaintiff, to the plaintiff's great damage as set forth in its writ.

McNeal-Edwards Company, by Its Attorneys, Asa P. French, Jonathan W. French. Clarence S. Towles, of Counsel.

EXHIBIT "G"

DISTRICT COURT OF THE UNITED STATES, DISTRICT OF MASSACHUSETTS

No. 2071. Law

McNEAL-EDWARDS COMPANY

v.

FRANK L. YOUNG COMPANY

PLAINTIFF'S SPECIFICATIONS

Now comes the plaintiff in the above-entitled cause and, complying with the order of the court upon the defendant's motion for specifications therein, says:

(1) There was no agreement in writing between the parties setting forth the terms of the contract referred to in the first count of the plaintiff's declaration. The contract was partly oral and partly by correspondence. It is fully set forth by this defendant in its suit against this plaintiff pending in this court and numbered 2054 Law.

It was an implied obligation of said contract, based upon the universal custom of the trades in which both the plaintiff and defendant were respectively engaged at the time of the transaction in suit, that the vendee, upon receipt of [fol. 79] the oil, should remove it from the drums forthwith, and return the latter, freight prepaid, to the vendor without demand therefor.

(2) a. No. See specification 1 supra.
b. See specification " (2) a", supra.
c. See specification " (2) a", supra.
d. See specification " (2) a", supra.
e. See specification " (2) a", supra.
f. See specification " (2) a", supra.
g. See specification " (2) a", supra.
h. See specification " (2) a", supra.
i. See specification " (2) a", supra.
j. See specification " (2) a", supra.
k. See specification " (2) a", supra.

(3) The plaintiff has been deprived of the use of the drums for more than five years, and has been put to the ex-

pense of obtaining others, and is informed and believes, and expects to show at the trial, that said drums, while in the possession of the plaintiff, have been exposed to the weather and have been otherwise so negligently cared for that they are now worthless, and that the plaintiff has been damaged thereby to the extent of their fair market value at the time they were received by the defendant in January, 1922, namely, $3,874.50 with interest.

McNeal-Edwards Company, by Its Attorney, Asa P. French.

DEFENDANT'S EXHIBIT A

Reilly-Edwards Company (etc.)

April 22, 1922.

The Frank L. Young Company, #111 Purchase St., Boston, Mass.

DEAR SIRS: We have today received a letter from the McNeal-Edwards Company reading:

"In regards to the drums that this lot of oil was shipped in, they were to be returned in a reasonable time and we think they have had time enough to dump them so please get after them to ship the drums back to us at once."

[fol. 80] Kindly give this matter your immediate attention and advise us when you will forward these drums back to the McNeal-Edwards Company.

Yours very truly, Reilly Edwards Company, by Edward J. Robel (?).

DEFENDANT'S EXHIBIT 3

July 12, 1922.

Reilly-Edwards Co., Baltimore, Md.

Attention Mr. W. T. Edwards

GENTLEMEN: We are enclosing herewith a letter which we received today from the Foreign Traders Company, Inc., 154 Nassau St., New York City, wherein they inquire

for price, etc., on Fish Guano. We are passing this along to you in hopes that it may be of interest to you.

In regard to empty drums for McNeal-Edwards Co., as mentioned in your letter of the 7th inst., would say that as advised by phone we are not in a position to furnish the drums until they are empty, and we do not feel like emptying the drums until after McNeal-Edwards have had an opportunity to see for themselves, in the original packages, the kind of oil they shipped us.

We hope you can get them to be reasonable and come up and see the goods, as we requested. It certainly is not fair to make us hold the goods any longer than we have.

Hoping to hear from you promptly in regard to this matter, we are

Very respectfully, Frank L. Young Co.

CJM-W. Enclosure.

DEFENDANT'S EXHIBIT 2

The McNeal-Edwards Co.

Reedville, Va., July 19th, 1922.

The Frank L. Young Co., Boston, Mass.

GENTLEMEN: We have been waiting very patiently for you to return our 1107 drums that we shipped you Jan. 18th but it seems that you have made no attempt to do so, we are sorry to have to keep after you about this matter as [fol. 81] it is embarrassing to have to do business in this way, but we must have our drums as we need them to ship out oil now and if you cannot ship all ship what you can, please advise when and how many you will ship. We are

Yours truly, The McNeal Edwards Co. W. T. Covington.

DEFENDANT'S EXHIBIT 1

22 Aug., 2 p. m., 4:11, Reedville, Va.

Frank L. Young and Co., 111 Purchase Street, Boston, Mass.:

Have you shipped any of our drums if not when and how many. Answer

McNeal Edwards Co.

IN UNITED STATES DISTRICT COURT

MEMORANDUM ON MOTION TO DISMISS—April 21, 1927

LOWELL, J.:

Motion to dismiss. It is argued that the action was not properly begun by service on the attorney of the non-resident defendant under Section 3 of Chapter 227 of the General Laws of Massachusetts. The contention is that as the former action brought by the present defendant was in the nature of a cross-action, the statute cited does not cover it. This contention is, in my opinion, without merit. Motion denied.

IN UNITED STATES DISTRICT COURT

MEMORANDUM ON PLEA IN ABATEMENT—April 26, 1927

LOWELL, J.:

The principal contention was the same one mentioned in the motion to dismiss, which has already been refused. The other contention was that there was already pending in this court another suit between the same parties and for the same cause of action. I rule that the former suit is not precisely similar to the present one, in that personal jurisdiction had not been acquired over the defendant in this suit, and the matters in controversy between the parties could not be thoroughly settled in the former suit.

Plea overruled.

[fol. 82] IN UNITED STATES DISTRICT COURT

DEFENDANT'S PETITION FOR APPEAL—Filed January 31, 1929

Now comes McNeal, Edwards Company, and says that, on or about the twenty-seventh day of November, 1928, this court entered judgment in the above-entitled cause in favor of the plaintiff and against the defendant, in which judgment, and the proceedings had prior thereto in said cause, certain errors were committed to the prejudice of the defendant, all of which are set forth specifically in the assignment of errors filed herewith.

Wherefore, the defendant prays for leave to appeal to the United States Court of Appeals for the First Circuit, for the correction errors so complained of, and that a transcript of the records, proceedings and papers in said cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

McNeal, Edwards Company, by Its Attorney, Asa P. French. Clarence S. Towles, of Counsel.

January 31, 1929.

Petition for appeal allowed.

J. M. Morton, Jr., U. S. District Judge.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S ASSIGNMENT OF ERRORS—Filed January 31, 1929

Now comes the defendant, McNeal-Edwards Company, and assigns as errors on the part of the court, at the trial of the above-entitled action, the following:

1. The court erred in overruling the defendant's plea in abatement.

2. The court erred in overruling the defendant's motion to dismiss.

3. The court erred in overruling the defendant's motion in arrest of judgment.

4. The court erred in refusing, over the objection and [fol. 83] exception of the defendant, to give the following instruction requested by the defendant, namely,

"Upon all the evidence, your verdict must be for the defendant, McNeal-Edwards Company."

5. The court erred in refusing, over the objection and exception of the defendant, to give the following instruction requested by the defendant, namely,

"Upon all the evidence, the plaintiff accepted the oil delivered under the contract in suit."

6. The court erred in refusing, over the objection and excepton of the defendant, to give the following instruction requested by the defendant, namely,

"There is no evidence that the plaintiff 'made known' to the defendant the purpose for which the oil delivered under the contract was to be used, and the plaintiff cannot recover under the third count of its declaration."

7. The court erred in refusing, over the objection and exception of the defendant, to give the following instruction requested by the defendant, namely,

"Where a person owes a duty to do an act by virtue of the obligation placed upon him by a valid contract, he has no right knowingly to do another act which will make it impossible for him to fulfill that obligation. To apply this to the case at bar, Frank L. Young Company, owing a duty to return the drums promptly, had no right by their intentional act to cause the drums to be placed in custodia legis, that is, under attachment, and to claim that they were therefore unable to so return them to McNeal-Edwards Company."

8. The court erred in refusing, over the objection and exception of the defendant, to give the following instruction requested by the defendant, namely,

"To so place them under attachment as described in the foregoing request, and to still retain them, constitutes a breach of the contract in suit, and your verdict must be for the defendant."

[fol. 84] 9. The court erred in admitting, over the objection and exception of the defendant, any and all evidence introduced by the plaintiff on the subject of the quality of the merchandise which was the subject of this controversy, as set forth in the defendant's bill of exceptions.

McNeal-Edwards Company, By its Attorney, Asa P. French. Clarence S. Towles, of Counsel.

Bond on appeal for $14,000, approved and filed January 31, 1929, omitted in printing.

[fol. 85] Citation, in usual form, showing service on Warner, Stackpole & Bradlee and M. B. Leach, Jr., omitted in printing.

[fol. 86] Clerk's certificate to foregoing transcript omitted in printing.

[Memorandum.—Orders of enlargement of time for docketing case to and including March 27, 1929, are here omitted. A. I. Charron, Clerk.]

[fols. 87 & 88] Minute entry of submission, October 8, 1929, omitted in printing.

IN UNITED STATES CIRCUIT COURT OF APPEALS, FIRST CIRCUIT

JUDGMENT—November 12, 1929

This cause came on to — heard on October 8, 1929, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel:

Upon consideration whereof, It is now, to wit, November 12, 1929, here ordered, adjudged and decreed as follows: The judgment of the District Court is vacated, the verdict set aside and the case is remanded to that court for further proceedings not inconsistent with the opinion passed down this day; the appellant recovers costs of appeal.

By the Court.

Arthur I. Charron, Clerk.

[fol. 89] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, OCTOBER TERM, 1929

No. 2345

MCNEAL-EDWARDS COMPANY, Defendant, Appellant,

v.

FRANK L. YOUNG COMPANY, Plaintiff, Appellee

Appeal from the District Court of the United States for the District of Massachusetts

Before Bingham, Anderson, and Wilson, JJ.

OPINION OF THE COURT—Filed November 12, 1929

ANDERSON, J.:

In January, 1922, the McNeal-Edwards Company, a Virginia corporation, contracted to sell to Frank L. Young Company, a Massachusetts corporation, 1107 drums of Prime "A" Crude Menhaden Fish Oil, for about $18,000, the contract providing that the purchaser should return the drums to the seller, freight prepaid. The oil was duly shipped and paid for in full in March, 1922. In September, 1922, the purchaser brought suit in the Massachusetts Superior Court, alleging breach of warranty of quality, and attached the drums, which it had not returned. The seller, in January, 1923, removed this suit to the Federal District Court, and counsel appeared specially in its behalf. This suit was subject to the provisions of G. L. Mass., chap. 227, sec. 1, that the attachment in such suit "shall be valid only [fol. 90] to secure the application of the property so attached to the satisfaction of the judgment."

In March, 1923, the seller brought an action, also in the District Court, against the buyer for the conversion of these drums, and its present counsel appeared in its behalf. On January 4, 1927, the purchaser brought a second suit in the Federal District Court against the seller, for the same cause of action as that contained in its first suit brought in September, 1922. It made service of the writ upon the counsel in the conversion suit, then pending in the same court and also again attached the same drums. On Febru-

ary 28, 1927, the buyer discontinued its first suit. The seller moved to abate the buyer's second suit, on the ground that the second suit was not a cross action within the fair meaning of G. L. Mass., chap, 227, secs. 2 and 3. These sections provide as follows:

"Section 2. If an action is brought by a person not an inhabitant of the commonwealth or who cannot be found herein to be served with process, he shall be held to answer to any action brought against him here by the defendant in the former action, if the demands are of such a nature that the judgment or execution in the one case may be set off against the judgment or execution in the other. * * *

"Section 3. The writ in such cross action may be served on the attorney of record for the plaintiff in the original action, and such service shall be as valid and effectual as if made on the party himself in the commonwealth."

This contention in substance is that the service upon the seller's attorney is not authorized under these sections; that the Federal District Court never acquired unrestricted jurisdiction,—not limited to the value of the attached drums. This motion was overruled and the seller duly excepted.

It is unnecessary for us to assume the duty of initial construction of these sections on the point now in question, for we are of opinion that the case may be disposed of on its merits without such decision. Clearly, the court below had jurisdiction to the extent of the value of the attached prop-
[fol. 91] erty, whether the service on the seller's attorney was or was not valid to give full jurisdiction. For present purposes, this is enough.

The cases went to trial together, with the result that in the suit for breach of warranty the jury found an alternative verdict for the Frank L. Young Company, for $10,730.17; in the conversion suit the jury found specially that the drums were worth $1,384; that the drums were, by the buyer, retained (before they were attached on September 15, 1922) an unreasonable time, and that the damage resulting to the McNeal-Edwards Company because of such unreasonable detention was $100. These findings in the conversion suit are made a part of the bill of exceptions in the other case.

The crucial question is that arising under the seller's contention that the purchaser was itself guilty of a breach of the contract, by its failure to return the drums, having a determined value of $1,384, within a reasonable time. When the buyer received this oil and found, as it claimed, that it was not of the quality called for by the contract, it might have refused to accept it. Instead of doing that, approximately six weeks later, it paid for the same in full, but "without prejudice" to its claims. Under the written contract, it was its duty, keeping the oil—good or bad—within reasonable time to empty the containers and return them to the seller. Assuming that defects in the oil (excessive viscidity) excused it from prompt performance of its duty during the cold weather when, as plaintiff claimed, the oil would not run from the containers, it plainly did not excuse it until the summer had nearly passed (September 15), when it attached the drums wrongfully retained by it until that time. The plaintiff-buyer then is in the position of suing on a contract which it had itself broken. This it cannot do. Whether the contract is to be construed under the law of Maryland or of Massachusetts, the result is the same. In both States the Uniform Sales Act is adopted; in both the peculiar doctrine of Britton v. Turner, 6 N. H. 481, is rejected. Maryland Code, Art. 83, chap. 1, sec. 22. Dougherty v. Gring, 89 Md. 535; Townes v. Cheney, 114 Md. 362; G. L. [fol. 92] Mass. c. 106, § 365; 3 Williston Contracts, sec. 1477 and cases cited.

The case falls within the doctrine of Sipley v. Stickney, 190 Mass. 43. In that case a suit was brought to recover for wages alleged to be due the defendant's farm manager. It appeared that the plaintiff had intentionally failed to act with the diligence, integrity and skill which his employment called for, particularly in that he had deceived his employer relative to the non-payment of bills run up by him as such manager. A verdict for the plaintiff was returned; but the Supreme Court held that "a wilful default in the performance of a stipulation not going to the essence of the contract bars recovery"; that "where the plaintiff has honestly tried to perform his contract, it is one thing to hold that it must have been the intention to make the commission of such a breach a condition precedent. But where the default is wilful the question in our opinion is a different one. Where a contractor commits a wilful default and yet claims

the contract price, he in effect claims that he has a right to break his contract. But he has no such right. 'The doctrine that a breach after part performance is not a defence unless it goes to the essence, does not give a party a right to commit a breach because it does not go to the essence; it merely excuses the breach to the extent just stated after it has been committed: Langdell, Summary of the Law of Contracts, sec. 168. In Metcalf on Contracts, pp. 7-9, the general doctrine is laid down that if the failure to perform the express contract be intentional, it is such bad faith that he can recover nothing'."

The only answer made by counsel for the appellee to this contention is that "No citation of authority is needed to the point that nothing but a substantial breach by one party is an excuse for non-performance by the defendant." No authorities are cited in support of this proposition, which plainly is not law in Massachusetts or in Maryland if the breach be wilful.

The alternative verdict reads as follows:

"The jury find for the plaintiff and assess damages in the sum of ten thousand seven hundred thirty and 17/100 dollars;

[fols. 93 & 94] But if, as a matter of law, the plaintiff is not entitled to a verdict, then the jury find for the defendant and consent that this alternative verdict may be entered on order of the United States District Court for the District of Massachusetts, or of the United States Circuit Court of Appeals for the First Circuit, or of the Supreme Court of the United States, with the same effect as if returned by them."

The result is that under this alternative verdict the defendant is entitled to judgment.

The judgment of the District Court is vacated, the verdict set aside and the case is remanded to that court for further proceedings not inconsistent with this opinion; the appellant recovers costs of appeal.

Thereafter, to wit, on December 23, 1929, within the time duly extended by the court, the following Petition for Rehearing was filed by the appellee:

[fol. 95] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

[Title omitted]

PETITION OF FRANK L. YOUNG COMPANY FOR REHEARING—Filed Dec. 23, 1929

Now comes Frank L. Young Company and says that on November 12, 1929, this Honorable Court (Bingham, Anderson, and Wilson, JJ.) vacated the judgment of the District Court for the District of Massachusetts, and remanded the case to the said Court for further proceedings not inconsistent with the opinion. Your petitioner further says that the action in the District Court was brought on behalf of the buyer of about eighteen thousand (18,000) dollars' worth of fish oil, to recover for breaches of warranty of the quality thereof; that the jury found for the plaintiff in the amount of $10,730.17. Your petitioner further says that the ground upon which this Honorable Court reversed the judgment of the District Court was that the plaintiff, by retaining in its possession until September 15, 1922, the defendant's drums in which the oil had been shipped, had committed an intentional breach of a provision of the contract of sale requiring return of the drums within a reasonable time.

[fol. 96] Your petitioner prays that this Honorable Court grant a rehearing of this case, and for cause thereof respectfully suggests that the Court committed error in its said opinion for the following reasons:

1. The Court has assumed that the breach, if any, of Frank L. Young Company in not returning the drums prior to September 15th was a wilful breach, whereas there was no evidence which would require the jury to find or permit the Court to instruct as matter of law that such breach, if any, was wilful or intentional.

2. There was no evidence before the jury upon which the jury could find that the breach by Frank L. Young Company in delaying the return of the drums to September 15th was wilful or intentional.

3. The jury's verdict in the case of McNeal-Edwards Company v. Frank L. Young Company could not be con-

sidered by this Court in arriving at a decision on the appeal in Frank L. Young Company v. McNeal-Edwards Company.

4. The jury's verdict in McNeal-Edwards Company v. Frank L. Young Company did not find that the breach by Frank L. Young Company of its obligation to return the drums was intentional.

5. By the law of Massachusetts referred to by the Court, a breach by the plaintiff not going to the essence of the contract will not bar recovery unless such breach was wilful and accompanied by bad faith.

6. By the general commercial law, which was binding upon the District Court under the decision of Swift v. Tyson, 16 Peters, 1, a breach by the plaintiff not going to the essence of the contract will not bar recovery, regardless of whether it was intentional.

7. There is no assignment of error based on, and nothing in the appellant's bill of exceptions dealing with, the alleged breach of appellee in failing to return the drums prior to September 15th.

[fols. 97 & 98] 8. No defense based upon failure of appellee to perform the contract is raised by the appellant's pleadings and no question relating to the failure to return the drums prior to September 15th was raised in the District Court either by pleading, motion for directed verdict, or appropriate request for ruling.

9. The Court could not authorize judgment for the defendant on the alternative verdict of the jury, under Article VII of the Amendments to the Constitution of the United States.

Frank L. Young Company, by Warner, Stackpole, Bradlee & Cabot, Its Attorneys.

Certificate

I, John G. Palfrey, of counsel for Frank L. Young Company, hereby certify that the above petition is presented in good faith, and not for purposes of delay, and that there are good and substantial grounds for the same in law and justice.

John G. Palfrey.

In United States Circuit Court of Appeals

Order Granting Rehearing—January 22, 1930

Upon petition of appellee, It is ordered that a rehearing in this case be, and the same hereby is, granted, and the case is assigned for reargument at the April session, 1930.

By the Court.

Arthur I. Charron, Clerk.

[fols. 99 & 100] Minute entry of submission on reargument omitted in printing.

In United States Circuit Court of Appeals

Order Modifying Judgment—July 1, 1930

It is ordered that the judgment entered November 12, 1929, be, and the same hereby is, modified to read as follows:

The judgment of the District Court is vacated, the verdict is set aside, and the case dismissed for want of jurisdiction, but without prejudice. No costs.

By the Court.

Arthur I. Charron, Clerk.

[fol. 101] In United States Circuit Court of Appeals for the First Circuit, October Term, 1929

No. 2345

McNeal-Edwards Company, Defendant, Appellant,

v.

Frank L. Young Company, Plaintiff, Appellee

Appeal from the District Court of the United States for the District of Massachusetts

Before Bingham, Anderson and Wilson, JJ.

Opinion on Rehearing—Filed July 1, 1930

January 5, 1922, the defendant, the McNeal-Edwards Company, a Virginia corporation, having no place of busi-

ness in Massachusetts, entered into a contract in Baltimore, Maryland, with the plaintiff, Frank L. Young Company, a Massachusetts corporation, wherein the defendant agreed to sell and the plaintiff agreed to buy by description 1,107 drums of Prime "A" Crude Menhaden Fish Oil at $.33 per gallon (about $18,000) in seller's drums f. o. b. Baltimore. The contract also provided that the purchaser should return the drums to the seller, freight prepaid. The oil was duly shipped and paid for in full in March, 1922. In September, 1922, the Frank L. Young Company brought suit in Massachusetts Superior Court alleging breach of warranty of quality, and attached the drums, which it had not returned. The McNeal-Edwards Company, on January 2, 1923, removed the suit to the Federal District Court for Massachusetts, counsel appearing specially for that pur-
[fol. 102] pose. In that suit the only service of process was the attachment of the drums.

In March, 1923, the McNeal-Edwards Company brought an action in the Federal District Court for Massachusetts against the Young Company for damages and conversion of the drums, and Asa P. French appeared as counsel for the plaintiff in that action.

January 4, 1927, the Young Company brought a suit in the same Federal District Court against the McNeal-Edwards Company for the same cause of action as that contained in its first suit of September, 1922.

In this writ of January 4 it was set out that the McNeal-Edwards Company was a Virginia corporation and a citizen and resident of that State, "having its usual place of business at Readville therein; which corporation cannot be found to be served with process; which corporation has brought an action, wherein Asa P. French is attorney of record for the plaintiff, in the District Court for our District of Massachusetts; in which action the demands are of such a nature that the judgment or execution therein may be set off against the judgment or execution herein."

The writ was made returnable on the third Tuesday of March, 1927, and directed the marshal to attach the goods of the defendant and summons it "by serving this writ on Asa P. French who has a usual place of business in Boston in the County of Suffolk and Commonwealth of Massachusetts, as said French is attorney of Record as aforesaid." The marshal's return on the writ shows that on January 5,

1927, he served the writ by chip attachment and summoned the defendant "by giving in hand to Asa P. French, attorney of record of said McNeal-Edwards Company, at Boston, in said District, copy of an original summons of this writ."

On February 23, 1927, the Young Company having obtained an order from the District Court for a special precept of attachment in the action brought January 4, 1927, the special precept was issued; and the officer's return on the special precept shows that on February 25, 1927 he attached 1,100 steel drums as the property of the defendant and, on the following day, summoned the defendant by giving in hand a copy of the precept to Asa P. French, attor- [fol. 103] ney of record, etc. The drums having been attached on the special precept on February 25th, the Young Company, on February 28, 1927, and before the term of court at which the writ of January 4, 1927 was returnable, caused its suit of September, 1922 to be discontinued.

On March 22, 1927, the writ of January 4, 1927, was entered late by leave of court; and on March 23, Asa P. French filed a special appearance for the McNeal-Edwards Company; and on the following day, "without waiving its special appearance, but relying thereon, and without submitting itself to the jurisdiction of the court," it filed a plea in abatement and a motion to dismiss the action.

In the motion to dismiss it was alleged that "the defendant is not a citizen or resident of the Commonwealth of Massachusetts, but was at the time of the beginning of this suit, and is, a citizen and resident of the Commonwealth of Virginia, and that no valid service has been made upon the defendant, as appears upon the face of the writ and the declaration in said action, and as disclosed by the records of this court" in the first suit brought by the Young Company against McNeal-Edwards Company and in the suit of McNeal-Edwards Company against the Young Company.

In the plea in abatement, after setting out that on the bringing of the action of January 4, 1927, there was pending in this court another suit between the same parties for the same cause of action, which was discontinued without notice to this defendant on February 28, 1927, it was alleged, among other things, that the defendant was "a corporate citizen and resident of Virginia, having no place of business in Massachusetts." It then set out the contract, the bringing of the first suit by the Young Company against

the defendant, that jurisdiction in that suit was predicated solely upon the attachment made of the drums, its removal to the District Court, the action brought by the McNeal-Edwards Company against the Young Company, and the bringing of the second action by the Young Company against it for the same cause of action as that alleged in the first suit, without first having discontinued the first suit, and that the process in the suit of January 4 was [fol. 104] served upon the attorney of record in the action brought by the Young Company; and alleged: (1) "That such service, under the circumstances heretofore alleged, cannot operate to give the plaintiff the right to satisfy a judgment, if any, against any property of the defendant except said containers, but for the presence of which in Massachusetts it would have been obliged to bring its original action in Virginia"; and (2) that "the service attempted to be made upon it in this case is void and of no effect, for the reason that a party bringing suit against a non-resident in a state court, and then claiming jurisdiction upon the sole ground that the defendant in such suit has property in this commonwealth which can be attached, cannot, if the suit is removed to the Federal Court, and a cross-action is instituted there, bring another suit, with [by] or without discontinuing the original suit, for the same cause of action, and thereby vest unrestricted jurisdiction in the Federal Court, by serving process therein upon the attorney for the plaintiff in such cross-action."

The plaintiff filed a replication. In it it did not deny that the defendant was "a corporate citizen and resident of Virginia, having no place of business in Massachusetts", as alleged in the plea, or question the allegation in its own writ that the defendant was a citizen and resident of Virginia and "cannot be found to be served with process" in Massachusetts, and which the return of the sheriff on the writ in its first suit also showed; and after admitting "that no personal jurisdiction was obtained over the defendant in that action [the first action] and that no judgment could have been given in that action" that could have been satisfied, except out of the property attached, it alleged the bringing of the action of the McNeal-Edwards Company against the Young Company and that "for the purpose of curing the defect of personal jurisdiction in the plaintiff's former action * * * the present action was brought and personal jurisdiction obtained by service on the attorney

of record in the McNeal-Edwards Company's said action under Gen. Laws of Massachusetts, Chapter 227, Sections 2 and 3, and Rule 53 of this court."

The motion to dismiss having been denied and the plea [fol. 105] overruled, "without waiving its motion to dismiss and its plea in abatement," the McNeal-Edwards Company filed an answer in which it denied each and every allegation in the plaintiff's writ and declaration and set up three special matters of defense.

The case was tried before a jury. The jury found a verdict for the plaintiff and assessed its damages in the sum of $10,730.17. And at the direction of the court, it rendered an alternative verdict to the effect that "if, as a matter of law, the plaintiff is not entitled to a verdict, then the jury find for the defendant, etc." It also made special findings to the effect: (1) that the oil delivered by the McNeal-Edwards Company to the Young Company was not of the quality and grade called for by the contract sued upon; and (2) that the amount of the damages sustained by the Young Company by reason of the inferiority in the quality and grade of the oil delivered was $10,730.17.

After the verdict was rendered, the defendant "appearing specially" filed a motion in arrest of judgment on the grounds that it appears upon the record: (1) that this court had never acquired jurisdiction of this defendant; (2) that the service made upon the defendant's attorney was void and of no effect; and (3) that "the District of Massachusetts is not the proper venue for hearing and determining said cause." This motion was also denied, subject to exception, and judgment was entered for the plaintiff.

The first three errors assigned relate to the denial of the defendant's motion to dismiss, the denial of its motion in arrest of judgment; and the overruling of its plea in abatement.

The other assignments of error relate to the merits of the case and the matters complained of occurred during the course of the trial.

[fol. 106] Opinion of the Court on Rehearing

BINGHAM, J.:

The questions raised by the first three assignments of error are whether the District Court acquired jurisdiction

either by the service of process upon Mr. French, the attorney of record of the McNeal-Edwards Company, in the suit brought by it against the Young Company, or by the supplementary attachment, or by the defendant, the McNeal-Edwards Company, having in this suit voluntarily submitted itself to the jurisdiction of the court.

It is not, and could not well be, contended that the defendant voluntarily submitted itself to the jurisdiction of the court. The record discloses that from the very inception to the close of the case the defendant appeared specially, reserving its right to question the jurisdiction of the court. So the questions, on this branch of the case, are whether jurisdiction over the suit was acquired by the supplementary attachment of defendant's property in the state, or over the defendant personally by serving process upon Mr. French under the circumstances herein disclosed.

Although the plaintiff's suit of January 4 against the McNeal-Edwards Company, a Virginia corporation, was brought in the Federal District Court, it contends and, in order to support the jurisdiction of the District Court, must contend that the provisions of Section 1, 2, 3 and 4 of Chapter 227, Gen. Laws Mass., hereafter quoted, are applicable to a suit brought in that court and obligatory upon it. Arkwright Mills v. Aultman & Taylor Co., 128 Fed. 195.

Section 8 of Chap. 181, Gen. Laws Mass., provides:

"Section 8. Foreign corporations having property in this commonwealth shall be liable to be sued and to have their property attached in the same manner and to the same extent as individuals who are residents of other states and who have property in this commonwealth. The service of the writ shall be made in the manner provided in chapters two hundred and twenty-three and two hundred and twenty-seven, with such further service as the court to which the writ is returnable orders."

[fol. 107] It is not contended and could not be that the service of the writ in this case was had under the provisions of Chap. 223. The service had purported to be under the provisions of Chap. 227, which reads as follows:

"Section 1. A personal action shall not be maintained against a person not an inhabitant of the commonwealth

unless he or his agent appointed under section five has been served with process in the commonwealth, or unless an effectual attachment of his property within the commonwealth has been made upon the original writ, and in case of such attachment without such service, the judgment shall be valid only to secure the application of the property so attached to the satisfaction of the judgment.

"Section 2. If an action is brought by a person not an inhabitant of the commonwealth or who cannot be found herein to be served with process, he shall be held to answer to any action brought against him here by the defendant in the former action, if the demands are of such a nature that the judgment or execution in the one case may be set off against the judgment or execution in the other. If there are several defendants in the original action, each of them may bring such cross action against the original plaintiff and may be allowed to set off his judgment against that which may be recovered against him and his co-defendants in like manner as if the latter judgment had been against him alone.

"Section 3. The writ in such cross action may be served on the attorney of record for the plaintiff in the original action, and such service shall be as valid and effectual as if made on the party himself in the commonwealth.

"Section 4. The court in which either of the actions is pending may order continuances to enable the absent party to defend the action brought against him, and to enable either party to set off his judgment or execution against that which is recovered against him, but the actions shall not be unreasonably delayed by the neglect or default of either party. The provisions of the following sections, relative to actions against persons absent from the commonwealth, shall not apply to a cross-action brought under the two preceding sections.

"Section 5. Every individual not an inhabitant of the commonwealth and every partnership composed of persons [fol. 108] not such inhabitants, having a usual place of business in the commonwealth, temporarily or permanently, or engaged here, temporarily or permanently, and with or without a usual place of business here, in the construction, erection, alteration, or repair of a building,

bridge, railroad, railway, or structure of any kind, shall, before doing business in the commonwealth, appoint in writing a person who is a citizen and resident thereof to be his or its true and lawful attorney upon whom all lawful processes against such individual or partnership may be served with like effect as if served on such person or partnership. The power of attorney shall be filed in the office of the state secretary, and copies certified by him shall be taken as sufficient evidence thereof, etc."

The service provided for in Sec. 5 is not applicable in this suit for the action was brought under Secs. 2, 3 and 4, and Sec. 4 expressly provides that in such case the mode of service authorized by Sec. 5 shall not apply.

It has been held by the Massachusetts court that, by force of Sec. 8, c. 181, above set out, a non-resident corporation may be sued and have its property attached in the manner provided in Sec. 1 of c. 227, but that where such corporation is not personally served with process and only a nominal, not "an effectual attachment," has been made "upon the original writ," that a supplementary attachment, subsequently had on special process, is not an attachment on the original writ and is invalid. Roberts v. Anheuser Busch Br. Ass., 215 Mass. 341, 102 N. E. 316. And it has also been held by the Supreme Court of the United States that neither under Sec. 915, Rev. Stat., nor under any provision of the Act of March 3, 1887, as amended August 13, 1888, can a supplementary attachment be had in a Federal District Court where no personal service can be had upon the defendant and where there was no personal appearance; that "an attachment is still but an incident to a suit, and that, unless jurisdiction can be obtained over the defendant, his estate cannot be attached in a Federal Court," as "attachment * * * [is] not a means of acquiring jurisdiction" on process issued out of a Federal Court, whether the attachment is made on the original or a supplementary process. Big Vein Coal Co. v. Read, 229 U. S. 31, 37, 38.

[fol. 109] It is, however, held that if property is attached on a writ issued out of a state court and the statutes of the state authorized the attachment, that upon removal of the cause to the Federal Court, jurisdiction over the property will be retained, notwithstanding the attachment would not

confer jurisdiction had it been made on a writ issued out of the Federal Court and no personal service had been obtained. Clark v. Wells, 203 U. S. 164; St. Louis, B. & M. Ry. v. Taylor, 266 U. S. 200, 208, 209.

As there was "no effectual attachment" of the defendant's property in the District of Massachusetts upon the "original writ" brought by the plaintiff (January 4, 1927) in this case, it follows that the supplementary attachment was invalid and would not confer jurisdictton the District Court under section 1; or under the Federal rule, unless jurisdiction over the defendant was obtained; and that the position taken by this court in its opinion in this case of November 12, 1929,—that the District Court "had jurisdiction to the extent of the value of the attached property, whether the service on the seller's attorney was or was not valid" to give jurisdiction over the person of the defendant, and therefore this court had jurisdiction to determine the merits of the case, without deciding whether the District Court acquired jurisdiction over the defendant,—was clearly wrong,

As to the question whether the defendant, a non-resident corporation, was present doing business in the District of Massachusetts so that personal service of process was or could be had upon it there, the following facts appeared.

The contract for the sale of the goods in question was made in Baltimore, Maryland, through a broker acting for both parties, and was to be performed and was performed there by the delivery of the goods f. o. b. Baltimore. It is evident from these facts that the sale was not made and that the right of action did not accrue in Massachusetts, but in Maryland, and the return of the sheriff on the writ in the removal suit brought by the plaintiff in the Massachusetts court against the defendant (now discontinued) shows that when the officer in September, 1922 attempted to make personal service of the writ he was unable to do [fol. 110] so for the reason that the defendant was not doing business through any officer or agent in Massachusetts.

The facts alleged in the writ in this case of January 4, 1927, are that the defendant was a Virginia corporation and a citizen and resident of that State, having its usual place of business at Readville therein, which corporation cannot be found to be served with process. And the de-

fendant's plea in abatement alleged that it was a corporate citizen and resident of Virginia, having no place of business in Massachusetts, which facts the plaintiff admitted by not denying them in its replication. It thus unquestionably appears that the defendant is a Virginia corporation, having its usual place of business there, and no place of business in Massachusetts. Also that "it cannot be found" in Massachusetts, that is, that it is not and was not present there, by its officers or agents, carrying on its business (People's Tobacco Co. v. Am. Tobacco Co., 246 U. S. 79); and this being so, it is evident that personal service of the writ on the non-resident corporation was not and could not be had upon it in the District of Massachusetts. It has been held over and over again that personal service on a non-resident corporation cannot be had in the District of the State where suit is brought, unless it is carrying on business there of such character and extent as would warrant the inference that it is present there by its officers authorized to receive service. St. Louis S. W. R. Co. v. Alexander, 227 U. S. 218, 226, 227; Philadelphia & Reading Railway Co. v. McKibbin, 243 U. S. 264, 265; Green v. C., B. & Q. Ry. Co., 205 U. S. 530; People's Tobacco Co. v. American Tobacco Co., 246 U. S. 79; Rosenberg Bros. & Co., Inc. v. Curtis Brown Co., 260 U. S. 516; Bank of America v. Whitney Bank, 261 U. S. 171; Cannon Mfg. Co. v. Cudahy Co., 267 U. S. 333; James-Dickinson Farm Mortgage Co. v. Harry, 273 U. S. 119; Eastman Kodak Co. v. Southern Photo Materials Co., 273 U. S. 359.

It has also been held that the doing of a single business transaction or even four separate disconnected transactions by a non-resident corporation in the State or District of suit would not warrant it being found present there through its officers or agents so that personal service could [fol. 111] be had upon it. Rosenberg Bros. & Co., Inc. v. Curtis Brown Co., 260 U. S. 516; Hunter v. Mutual Reserve Life Insurance Co., 218 U. S. 573; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727. See also Kirven v. Virginia-Carolina Chemical Co., 145 Fed. 288; Delaware & H. Canal Co. v. Mahlenbrock, 63 N. J. L. 281, 43 Atl. 978; Penn Collieries Co. v. McKeever, 183 N. Y. 98; Booth v. Weigand, 30 Utah 135, 83 Pac. 734; 12 R. C. L. s. 48.

Although the defendant corporation was not present doing business in the District of Massachusetts at the time

this suit of January 4, 1927 was brought, the contention is made that the District Court acquired jurisdiction over the defendant and the cause of action by virtue of the service that was had upon the defendant's attorney of record, pursuant to the provisions of Secs. 2 and 3 of c. 227 of the Gen. Laws of Massachusetts; that under the provisions of those sections the Massachusetts courts have upheld the service there authorized on the theory that a non-resident by bringing suit in a Massachusetts court assents to its attorney receiving service in any suit or suits which a defendant or defendants in the original suit should see fit to bring against it (Aldrich v. Blatchford, 175 Mass. 369, 371); and that the service being held valid as to process issuing out of the state court, it should be held valid and enforced under the Conformity Act, Rev. Stats. s. 914, as to process issuing out of a federal court in the District of Massachusetts.

It is well settled that a question of this character (the acquisition of jurisdiction over a defendant by the service of process) involves the jurisdiction of the court as a Federal Court, which jurisdiction cannot be enlarged or abridged by any statute of a state or the decisions of its courts; and that this is true notwithstanding the so-called Conformity Act, Rev. Stats. s. 914. See Mexican Central R. R. v. Pinkney, 149 U. S. 194, 208, 209; Southern Pac. v. Denton, 146 U. S. 202; Goldey v. Morning News, 156 U. S. 518; Wabash Western Railway v. Brow, 164 U. S. 271, 276; Mechanical Appliance Co. v. Castleman, 215 U. S. 437; Western Loan & Savings Co. v. Butte & Boston Mining Co., 210 U. S. 368; Davidson Marble Co. v. Gibson, 213 U. S. [fol. 112] 10, 18, 19; Davis v. C. C. C. & St. L. Ry., 217 U. S. 157, 174; Western Indemnity Co. v. Rupp, 235 U. S. 261. In other words, the service of process authorized by the Statute of Massachusetts (Secs. 2, 3 and 4, c. 227), as construed and upheld by its courts, is not binding upon and will not be enforced in a federal court, if to do so would enlarge or abridge its jurisdiction, and this question of jurisdiction, the ultimate determination of which is for the Supreme Court (Mechanical Appliance Co. v. Castleman, supra), is subject to review in this court, the whole case being before us on appeal. American Electric Welding Co. v. Lalance & Grosjean Mfg. Co., 249 Fed. 968; In re N. Y. etc. Steamship Co., 155 U. S. 531; United States v.

Jahn, 155 U. S. 109. See also 213 Stat. L. 926, c. 229 & 128.

We know of no case where suit was brought in a federal court and constructive service of process, as authorized by a statute of a state and the decisions of its courts, was had, that the jurisdiction of the court over the cause has been upheld in the appellate courts in the absence of a waiver of personal service. And the same is true if the suit was brought in a state court and seasonably removed to the federal court.

In So. Pac. Co. v. Denton, supra, the plaintiff Denton was a citizen of Texas and resided in the Eastern District thereof. The defendant was a Kentucky corporation doing business and having an agent in the Western District of Texas. The suit was brought in the federal court for the Western District of Texas. The defendant appeared specially and objected to the jurisdiction of the court. Under the Federal Statutes the suit could have been brought either in the Eastern District of Texas or in the District of Kentucky, and although the suit was brought in the wrong district (a question of venue) the defendant by appearing generally would waive the objection to the jurisdiction of the court on that score. A statute of Texas as construed by its courts (Texas Laws 1887, c. 128) made an appearance in behalf of a defendant, although in terms limited to the purpose of objecting to the jurisdiction of the court, a waiver of immunity from the jurisdiction by reason of non-residence. The lower federal court held that the non-resident defendant, by appearing specially and ob- [fol. 113] jecting to the jurisdiction, consented that its special appearance should be treated as general and a waiver of its objection to the jurisdiction of the court. But when the case came before the Supreme Court it reversed the decision of the court below and refused to apply and enforce the statute of Texas, as construed by its courts.

In Mexican Central Railway v. Pinkney, supra, the plaintiff Pinckney was a citizen and resident of the Western District of Texas. The defendant was a Massachusetts corporation, with its principal place of business in Boston. It owned and operated a line of railroad and did business in the Western District of Texas. Service was had upon one Lawton, as its local agent in that district. Lawton was not the local agent of the defendant upon whom service could be had. The defendant appeared specially and filed a plea

in abatement, setting out that Lawton was not its local agent. The plaintiff demurred to the plea and the lower federal courts sustained the demurrer: In the Supreme Court the service was held bad on the ground that Lawton was not the defendant's local agent. It also held that the defendant's special appearance for the purpose of excepting to the service and, after its plea was overruled, its filing a general answer, could not be deemed a general appearance; that to apply and enforce the statute of Texas in the federal court would be to contravene the Acts of Congress manifesting an intention "not to leave the jurisdiction of the inferior federal courts to the regulation and control of state legislation"; also that state legislation limiting the power of review given appellate courts by the Acts of Congress, over the judgments of their lower courts, involving a question concerning the jurisdiction of the courts, would not be enforced.

In Goldey v. Morning News, supra, the plaintiff brought her action in one of the State Courts of New York against the defendant, a Connecticut corporation, having no place of business and doing no business in the State of New York. Service was had under a statute of the state (see 22 Fed. 635, 636) by serving the summons in New York upon the president of the corporation, temporarily there, who was a resident and citizen of Connecticut. No attachment of property was had. The defendant appeared specially for [fol. 114] the purpose of presenting a petition for removal to the Federal Court, and the action was removed into the Circuit Court for the Eastern District of New York. In the Circuit Court the defendant, appearing specially, filed a motion, supported by affidavits to the above facts, to set aside the service. The Circuit Court set aside the service, declared it null and void, and the plaintiff sued out a writ of error. In the Supreme Court it was held: (1) "that a court of justice cannot acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction, except by actual service of notice within the jurisdiction upon him or upon some one authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service"; that "whatever effect a constructive service may be allowed in the courts of the same Government, it cannot be recognized as valid by the courts of any other Government"; (2) that

"the principle which governs the effect of judgments of one state in the courts of another state is equally applicable in the Circuit Courts of the United States, although sitting in the state in which the judgment is rendered"; (3) that "service of mesne process from a court of a state, not made upon the defendant or his authorized agent within the state, although there made in some other manner recognized as valid by its legislative acts and judicial decisions, can be allowed no validity in the Circuit Courts of the United States, after the removal of the case into that court, unless the defendant can be held, by virtue of a general appearance or otherwise, to have waived the defect of service, and to have submitted himself to the jurisdiction of the court"; (4) that the defendant by appearing specially and filing its petition for removal did not waive the defects in the service of the summons; that to so hold "would be inconsistent with the terms, as well as with the spirit, of the existing Acts of Congress regulating removals"; (5) that "the jurisdiction of the Federal Courts depends upon the acts passed by Congress pursuant to the powers conferred upon it by the Constitution of the United States and cannot be enlarged or abridged by any statute of a state"; that "one great object in the establishment of the courts of [fol. 115] the United States and regulating their jurisdiction was to have a tribunal in each state * * * to which all who were non-residents or aliens might resort for legal redress"; and (6) that the Conformity Act (Rev. Stats. s. 914), requiring the practice in the Federal Courts to conform, as near as may be, to that "existing at the time in the courts of the state in which it is held, applies only to cases of which the court has jurisdiction according to the Constitution and laws of the United States."

This case undoubtedly decides that a non-resident person or corporation may resort to the federal courts other than that of his or its residence and there litigate his controversies with a citizen or citizens there residing untrammelled by state legislation authorizing constructive service of process, which, if given effect, would abridge or enlarge the jurisdiction of the Federal Court.

In Mechanical Appliance Co. v. Castleman, supra, the action was brought in a state court of Missouri against a non-resident corporation and removed to the Federal Court for the Eastern District of Missouri on the ground of di-

verse citizenship. In the Federal Court a plea to the jurisdiction was filed. The return of service by the sheriff of the summons issued out of the state court appeared to be valid on its face. The plea to the jurisdiction, and the affidavits filed in its support, disclosed that the corporation was not doing business in the State of Missouri at the time of the service of summons, and that the person served with the process was not the agent of the defendant at the time. In the Circuit Court the plea to the jurisdiction was overruled on the ground that the facts stated in the return of the sheriff upon the summons were conclusive and could not be controverted by the defendant. In making this ruling the court followed the law of Missouri, as held by its highest court, that in a case of this kind a return of this character is conclusive upon the parties. In the Supreme Court it was held that the return of the sheriff "was not conclusive upon the question of service"; "that a foreign corporation can be served with process within the state only when it is doing business therein, and that such service must be upon an agent who represents the corporation in [fol. 116] its business"; that "in cases which concern the jurisdiction of the Federal Courts, notwithstanding the so-called Conformity Act, Rev. Stats. s. 914, neither the statutes of the state nor the decisions of its courts are conclusive upon the Federal Courts". And having reached this conclusion it reversed the judgment of the lower court and directed that the case be dismissed for want of jurisdiction.

In Wabash Western Railway Co. v. Brow, supra, after removal to the Federal Court, the defendant, a non-resident corporation, filed a plea to the jurisdiction on the ground that personal service had not been had upon it in the state court, which was overruled. The facts were that the corporation was neither incorporated, nor did business, nor had any agent in the state in which the suit was brought. The lower courts held that the defendant by filing its petition for removal in the state court, without specifying that it appeared specially for that purpose, waived its right to object to the service of process upon it after the removal of the case into the Federal Court. But the Supreme Court held that this was not so; that the defendant had a statutory right to remove the case; and that "an acknowledged right cannot be forfeited by pursuit of the means the law affords of asserting that right"; and that to decide

otherwise "would be to place a limitation upon the jurisdiction of the Circuit Court, which is wholly inconsistent with the act" (the removal statute).

In Davidson Marble Co. v. Gibson, supra, the action was brought in the Federal Court for the Northern District of California. The United States was the real party plaintiff and three citizens and residents of the State of Illinois were defendants; and under the Act of Congress regulating such matters the action was required to be brought in the District Court whereof the defendants were inhabitants. As none of the defendants lived in the Northern District of California the court below was without jurisdiction. But although the defendants appeared specially and objected to the jurisdiction, the lower court held that their objection to the jurisdiction had been waived, basing its decision on Rule 22 of that court, which provided: "Any party may, without leave of court, appear specially in any action at [fol. 117] law or suit in equity for any purpose for which leave to appear could be granted by the court, by stating in the paper which he serves and files that the appearance is special and that if the purpose for which such special appearance is made shall not be sanctioned or sustained by the court, he will appear generally in the case within the time allowed therefor by law, or by the order of court or by stipulation of the parties. If such statement be not made as above provided, the appearance shall be deemed and treated as a general appearance."

In the defendants' special appearance and objection to the jurisdiction, they did not state that "if the purpose for which such special appearance is made shall not be sanctioned or sustained by the court, they will appear generally in the case." In the Supreme Court, it was held that "the rule, as construed and applied in this case, is inconsistent with the laws of the United States, and therefore invalid. Rev. Stat. s. 918. A party who is sued in the wrong district, and does not waive the objection, may of right appear specially and object to the jurisdiction of the court, and the decision being against his objection, may of right bring the question directly to this court. The rule substantially impairs his right to appeal to this court, a right which is conferred by statute. 26 Stat. 826, c. 517, March 3, 1891. It says to him, you may appear specially and object to the jurisdiction, only upon the condition that

you will abide by the decision of a single judge; if that is against you, you must waive your objection and enter a general appearance; if you do not agree to do this, your special appearance will be deemed to be general. We think it was beyond the power of the Circuit Court to make and enforce a rule which imposes upon defendants such conditions, and transforms an objection to the jurisdiction into a waiver of the objection itself. The jurisdiction of the Circuit Court is fixed by statute. In certain cases a defendant may waive an objection to the jurisdiction over his person. But he cannot be compelled to waive the objection if he chooses seasonably to insist upon it, and any rule of court which seeks to compel a waiver is unauthorized by law and invalid." Having reached this conclusion it [fol. 118] reversed the judgment and directed a dismissal of the action for want of jurisdiction.

This case and those previously cited and reviewed disclose that a non-resident corporation is given by the Acts of Congress (1) the right to resort to a federal court, other than that of its residence, to litigate its controversies with citizens there residing; (2) the right, when sued in a state court, to remove the case to the federal court; (3) the right, when sued in a federal court, or in a removal case, to appear specially and object to the jurisdiction of the court (as to district of suit or service of process), and, its objection being overruled, the right to have the question reviewed by the proper federal appellate court. That a rule of court, statute of a state, or decision of its court, abridging and limiting any of these rights, will not be upheld and enforced in a federal court; and that this is particularly true as to a rule of court or statute of a state which undertakes to compel a non-resident to submit to the jurisdiction of the court, because of its having taken such action as the law affords in the enforcement of such a right. As said in the Wabash Railway case, supra, "an acknowledged right cannot be forfeited by pursuit of the means the law affords of asserting that right".

But while the right of a non-resident defendant to appear specially, in a suit brought in or removed to a federal court, and object to its jurisdiction for want of proper service, is upheld in the federal courts, notwithstanding the existence of a statute of a state, or rule of the federal court, making such appearance a waiver of the objection,

it was held in York v. Texas, 137 U. S. 15, 17, 20, that a state might by a statute or the decisions of its courts, establish such a rule of practice within its jurisdiction, and that its enforcement there would not be a violation of the "due process" clause of the Fourteenth Amendment, as that clause did not affect or control the power of the state court to render judgment. It would seem, however, that the York case was overruled in Riverside Mills v. Menefee, 237 U. S. 189, 193, 194, 195, for there it was held that the assumption of jurisdiction by the state court and its rendering judgment against a non-resident corporation, [fol. 119] doing no business in the state and having no qualified agent therein upon whom service may be made, was a violation of the due process clause of the Fourteenth Amendment "since the very act of fixing by judicial action without a hearing a sum due, even though the method of execution be left open, would be in and of itself a manifestation of power repugnant to the due process clause."

The statute of Massachusetts (c. 227, ss. 2, 3, 4), if upheld and enforced in the federal court for the District of Massachusetts, would contravene the Acts of Congress in two important particulars. First, it would abridge the right given a non-resident to sue in that court by making the exercise of the right conditional upon its waiving personal service of process upon it, in case any citizen or citizens of Massachusetts, made defendants in its suit, should conclude to bring independent actions against it. And second, it would enlarge the jurisdiction of the federal court in the District of Massachusetts, as to suits brought against the non-resident by doing away with the requirement of personal service of process and substituting in its place the constructive service provided for in the State statute. For these reasons we think the statute of Massachusetts cannot be upheld and enforced in the District Court for Massachusetts, whether its enforcement would or would not contravene the due process clause of the Fourteenth Amendment, which the Supreme Court in Riverside Mills v. Menefee, supra, its latest decision on the question, held that it would.

It is, however, further contended that the constructive service had in this case upon the attorney of record for the defendant was adequate, on the theory that the plaintiff's suit with reference to that of the defendant was a set-off or in the nature of a set-off. Set-off, as generally under-

stood, and as provided for in the statutes of Massachusetts (Gen. Laws, c. 232), is a plea or defense filed in the action in which it is pleaded, and not an independent suit. It concerns mutual demands and the demand set up in the plea must be "liquidated or capable of liquidation by calculation"; and the respective demands being determined, a single judgment is entered for the party to whom a bal- [fol. 120] ance is due. No writ is issued, no service of process is required, no attachment of property is permitted, as would be in the bringing of an independent suit, for it is a plea in defense.

But under the provisions of Secs. 1, 2, 3 and 4 of Chap. 227, all the requisites of an independent suit are present, for the issuance of a writ and service of the process are required, and an attachment of property thereon is authorized. Section 4 likewise shows that the cross-action or cross-actions authorized by Sec. 3 are independent suits, for if a single suit is brought the writ may be made returnable in a different court of the State from that in which the suit of the non-resident was brought; or in case of two or more so-called cross-actions, they may be brought in as many different courts of the State as there are courts in which jurisdiction may be had.

Furthermore, had the suit of the McNeal-Edwards Company, the non-resident, been on a joint obligation against three defendants, and each of the three had separate demands against the non-resident, each defendant could have maintained separate independent suits against the non-resident, and each could have had his separate judgment off-set against the joint judgment of the non-resident against them, for the last clause in Sec. 2 provides:

"If there are several defendants in the original action, each of them may bring such cross-action against the original plaintiff and may be allowed to set-off his judgment against that which may be recovered against him and his co-defendants in like manner as if the latter judgment had been against him alone."

This provision of Sec. 2 discriminates against a non-resident in that it allows residents of the State to off-set judgments obtained against him, which its other statutes forbid, as between judgment creditors regularly served with

process. See Gen. Laws, Mass. c. 235, S. 27 (4), where it provides:

"Executions between the parties may, if required by either party, be set-off one against the other * * * but such set-off shall not be allowed * * *.

Fourth. If there are several debtors in one execution, to a part of whom only the amount due on the other is due."

We do not think that the jurisdiction of the Federal [fol. 121] Court over the person of a non-resident defendant can be thus enlarged or abridged by a statute of a state; that a state statute such as this authorizing the bringing of an independent suit or suits against a non-resident corporation, asserting jurisdiction over it, though not present doing business through its officers within the state and district of suit, cannot be sanctioned or justified under the law of set-off, or as a legitimate extension of it. That the steps the statute purports to authorize are those required in bringing an independent suit or suits, viz., the issuance of an independent writ or writs, the service of the process, the attachment of property thereon, and the rendition of distinct judgments, none of which are essential to the law of set-off. That in the Federal Court personal service of process, upon a non-resident corporation, in the absence of waiver, is essential to its jurisdiction; and that the statutory service here relied upon is but an attempt to assert personal jurisdiction where none in fact exists, and will not be recognized.

Sections 2, 3 and 4 of Chap. 227 are clothed in the same language as when first enacted in 1823. Section 1 has been amended. That section as originally drafted, and for many years thereafter (Gen. Sts. Mass., 1860, c. 126; Eliot v. McCormick (1887), 144 Mass. 10, 12), either alone or in connection with other statutes, authorized a personal judgment against a non-resident defendant who had previously been an inhabitant of the state, by bringing an action against him and leaving the summons at his last place of abode in the state. But in the case above cited (144 Mass. 10, 12), rendered after the decision of Pennoyer v. Neff, 95 U. S. 714, the Massachusetts court uprooted such service. That species of service and the one authorized by Sections 2, 3 and 4 of c. 227 involve the same mental conception and are off the same piece of cloth.

The result is that our former order in this case must be modified and as modified will read:

The judgment of the District Court is vacated, the verdict is set aside, and the case dismissed for want of jurisdiction, but without prejudice. No costs.

Anderson, J., dissents.

[fol. 122] In United States Circuit Court of Appeals for the First Circuit

[Title omitted]

Dissenting Opinion—Filed September 16, 1930, as of July 1, 1930

Anderson, J. (dissenting):

I am unable to agree that there was no jurisdiction under G. L. Mass. c. 227, § § 2 and 3. Service on the attorney of the McNeal-Edwards Company in a suit where, admittedly, the executions could be set off against each other, seems to me a valid service. The present decision is entirely inconsistent with the well-considered opinion of District Judge Francis Lowell in Arkwright Mills v. Aultman & Taylor Co., 128 Fed. 195, a decision in 1904. The same case was before this court on the merits in 145 Fed. 783.

In Huntington Mfg. Co. v. Bradford Worsted Spinning Co., in a decision by Circuit Judge Dodge, in 1925, now reported in 37 Fed. (2) 730, the same ruling was made. The [fol. 123] only contention there was, that because the attorneys on whom the service was made were not directly employed by the defendant corporation, but by its assignees for the benefit of creditors, the service was invalid. But Judge Dodge found this distinction of no avail.

Jurisdiction by service under this statute has been the general and well-recognized rule in this District from time immemorial. Probably a careful search of the files of the District Court would disclose many other cases in which the jurisdiction was thus grounded, and unquestioned by any counsel or by the court.

That the statute is constitutional was held by Chief Justice Holmes in Aldrich v. Blatchford, 175 Mass., 369, a decision in 1900.

I know of no reason to suppose that Mr. Justice Holmes and his present associates on the Supreme Court of the United States do not now hold the same views which he then so cogently expressed. The gist of the decision is found in the sentence reading, "The foreign company by employing an attorney to begin an action against the defendant in Massachusetts, thereby assents to the attorney's receiving service in a counter suit, and gives him such powers as make the service sufficient."

The doctrine thus stated seems to me to be irrefutable. If such service was good in the Massachusetts courts, under the Conformity Act (R. S. s. 914), it was good in the Federal court. It follows that, both on principle and on authority, service on the attorney of the McNeal-Edwards Company grounded jurisdiction in the Young Company's suit. That the McNeal-Edwards Company, a Virginia corporation, should be permitted to resort, either to a Massachusetts court or to the Massachusetts District Court, without, by necessary implication, thus authorizing valid service on its attorney in a counter-suit against it, seems to me utterly unsound.

I am also unable to assent to the majority views with relation to set-off. Set-off is a fairly broad term. It applies as much to executions in separate suits as to counterclaims pleaded in defence. G. L. Mass. chap. 235, s. 27; 34 Cyc. pp. 625, 627, 628; Cook v. Mills, 5 Allen, 36. Statutes [fol. 124] have extended the right. Compare Waterman Set-off, p. 2. Perry v. Pye, 215 Mass. 403, 413, 414 and authorities cited.

I find nothing in the cases, cited in the last paragraph on page 11 of the majority opinion, inconsistent with the prior holdings in this District and the views I have expressed. Riverside Mills v. Menefee, 237 U. S. 189, simply holds that service on a resident director of the defendant corporation, which was not doing business in North Carolina, did not ground jurisdiction in North Carolina under the 14th Amendment and under Pennoyer v. Neff, 95 U. S. 714.

I concur with my associates that the attachment under a special precept, and not on the original writ, was no legal basis for jurisdiction. The fairly technical decision in Roberts v. Anheuser Busch Co., 215 Mass. 341, is binding on us. I also agree that the defendant corporation was not

so doing business in Massachusetts as to ground service under the doctrine of International Harvester Co. v. Kentucky, 234 U. S. 579. See also Rosenberg Co. v. Curtis Brown Co., 260 U. S. 516.

But the ruling of no jurisdiction under the statutes, supra, is of far reaching importance; it overturns a practice generally regarded as long settled.

The results of this ruling are open to the same condemnation aptly stated by Mr. Justice Miller in Partridge v. The Insurance Company, 15 Wall. 573, at 580, as follows:

"It would be a most pernicious doctrine to allow a citizen of a distant state to institute in these courts a suit against a citizen of the state where the court is held and escape the liability which the laws of the state have attached to all plaintiffs of allowing just and legal set-offs and counter claims to be interposed and tried in the same suit and in the same form (forum?)."

A true copy.
Attest:
Arthur I. Charron, Clerk. (Seal United States Circuit Court of Appeals, First Circuit.)

[fol. 125] In United States Circuit Court of Appeals

[Title omitted]

Clerk's Certificate re Petition for Appeal

I, Athur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that on September 12, 1930, a Petition for Appeal to the United States Supreme Court, Assignment of Errors, Bond on Appeal and Præcipe were filed by Frank L. Young Company, and that on September 16, 1930, said petition for appeal was denied as follows:

"The question of the validity or constitutionality of the state statute is not presented in the case and was not decided. This being so no right of appeal to the Supreme Court exists, and the application for an appeal is denied. The petitioner, however, may present its application to the

Supreme Court for allowance, accompanying the same with a copy of this paper. Otherwise it should apply for certiorari.

George H. Bingham, U. S. Circuit Judge.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this eighteenth day of September, A. D. 1930.

Arthur I. Charron, Clerk. (Seal United States Circuit Court of Appeals, First Circuit.)

[fol. 126] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 127] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 24, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 35,412. U. S. Circuit Court of Appeals, First Circuit. Term No. 490. Frank L. Young Company, petitioner, vs. MeNeal-Edwards Company. Petition for a writ of certiorari and exhibit thereto. Filed September 29, 1930. File No. 35,412.

FILE COPY

Office Supreme Court
FILED
SEP 29 193
CHARLES ELMORE CR

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 490

FRANK L. YOUNG COMPANY, PETITIONER,

vs.

McNEAL-EDWARDS COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

JOHN G. PALFREY,
W. BARTON LEACH,
CHARLES F. ALBERT,
Counsel for Petitioner.

(35,412)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 490

FRANK L. YOUNG COMPANY, PETITIONER,

vs.

McNEAL-EDWARDS COMPANY, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Justices of the Supreme Court of the United States:

The petition of Frank L. Young Company respectfully shows:

Your petitioner is a Massachusetts corporation with its principal place of business at Boston, Suffolk County, Massachusetts, and the respondent is a Virginia corporation, having no place of business in Massachusetts.

In January, 1922, your petitioner and the respondent entered into a contract (Record, pp. 18-20) by which your petitioner agreed to purchase and the respondent agreed to sell a quantity of "Prime A" crude men-

laden fish oil, the oil to be shipped in the respondent's drums, which your petitioner was to return freight prepaid. The oil was shipped in January, 1922, and the contract price of about $18,000 was paid in March, 1922.

Your petitioner examined and tested the oil before removal from the drums and within a reasonable time made claim against the respondent for breach of warranties of quality with regard to the oil. The respondent refused to recognize claims with regard to the oil and demanded immediate return of the drums. On September 15, 1922, the drums were attached by your petitioner in an action against the respondent to recover damages for breach of warranty.

In March, 1923, the respondent, through Asa P. French, counsel of record, brought an action against your petitioner in the United States District Court for the District of Massachusetts, alleging the wrongful detention and conversion of the drums. This action was tried with that now in question and resulted in a judgment for the respondent for one hundred dollars' damage for the unreasonably long detention of the drums.

While the aforesaid action was pending, your petitioner commenced the present cross-action to recover damages for breach of warranty of the oil and caused service to be made upon Asa P. French, "as said French is attorney of record" of the respondent. The previous action in which the drums were attached was discontinued. The service upon respondent's counsel was made pursuant to the provisions of Massachusetts

General Laws, chapter 227, sections 2 and 3, as follows:

> "SECTION 2. If an action is brought by a person not an inhabitant of the commonwealth or who cannot be found herein to be served with process, he shall be held to answer to any action brought against him here by the defendant in the former action, if the demands are of such a nature that the judgment or execution in the one case may be set off against the judgment or execution in the other. If there are several defendants in the original action, each of them may bring such cross-action against the original plaintiff and may be allowed to set off his judgment against that which may be recovered against him and his co-defendants in like manner as if the latter judgment had been against him alone.
>
> SECTION 3. The writ in such cross action may be served on the attorney of record for the plaintiff in the original action, and such service shall be as valid and effectual as if made on the party himself in the commonwealth."

These statutes have been held by the Supreme Judicial Court of Massachusetts to be part of the general law of set-off and counterclaim, and the mode of service therein provided has been held to give reasonable notice. *Aldrich v. E. W. Blatchford & Co.*, 175 Mass. 369.

The respondent, appearing specially, filed a motion to dismiss and a plea in abatement which, after hearings before Lowell, District Judge, were respectively denied and overruled. (See memorandum, Record, p.

81.) Thereupon the respondent filed an answer of general denial, with certain affirmative pleas. At the trial the jury made a special finding that the oil was not of the quality and grade called for by the contract and returned a verdict for your petitioner in the sum of $10,730.17 (Record, p. 14). The respondent then filed a motion in arrest of judgment on the ground that the court never acquired personal jurisdiction of the respondent. This motion was heard by Morton, District Judge, and overruled. Thereupon, judgment was entered for your petitioner and the respondent duly appealed to the United States Circuit Court of Appeals for the First Circuit.

The appeal came on to be heard in the Circuit Court of Appeals before Bingham, Anderson, and Wilson, Circuit Judges, and on November 12, 1929, that court rendered its decision remanding the case to the District Court with instructions to enter judgment for the respondent. The decision (Record, pp. 87-91) proceeded on the theory that the jury's finding in the action brought by the respondent that the drums were detained an unreasonable length of time constituted a wilful breach of contract which was a complete bar to any recovery by your petitioner for the breach of warranty. The question of jurisdiction over the respondent was not considered.

Your petitioner duly presented a petition for rehearing, urging that the court's decision was unsupported by the record and was in conflict with general commercial law as enunciated in the decisions of this Honorable Court, in the courts of England, and in other Federal and State courts, all holding that a

breach of a collateral provision of the contract is not a bar to recovery thereon, but goes merely in mitigation of damages.

This petition was granted and the case was again argued before the same judges. Thereafter, on July 1, 1930, the court rendered its present decision, Anderson, J., dissenting, ordering the case dismissed for want of jurisdiction. The basis of this decision is summarized in the opinion by Bingham, J.:

> "The statute of Massachusetts (c. 227, ss. 2, 3, 4), if upheld and enforced in the federal court for the District of Massachusetts, would contravene the Acts of Congress in two important particulars. First, it would abridge the right given a non-resident to sue in that court by making the exercise of the right conditional upon its waiving personal service of process upon it, in case any citizen or citizens of Massachusetts, made defendants in its suit, should conclude to bring independent actions against it. And second, it would enlarge the jurisdiction of the federal court in the District of Massachusetts, as to suits brought against the non-resident by doing away with the requirement of personal service of process and substituting in its place the constructive service provided for in the State statute. For these reasons we think the statute of Massachusetts cannot be upheld and enforced in the District Court for Massachusetts, whether its enforcement would or would not contravene the due process clause of the Fourteenth Amendment, which the Supreme Court in *Riverside Mills v. Menefee, supra,* its latest decision on the question, held that it would."

The court further held that the statute was not a reasonable extension of the law of set-off in spite of the decision of the highest State court so construing it.

A certified copy of the record in the Circuit Court of Appeals is herewith furnished as part of this application.

Your petitioner respectfully prays that this petition may be allowed for the following reasons:

1. The decision of the Circuit Court of Appeals nullifies the effect of an important Massachusetts statute that has been in continuous and useful operation for more than a century.

2. The decision of the Circuit Court of Appeals, if followed, also nullifies similar statutes of six other States.

3. Of the seven United States judges who have passed directly upon the question here involved, only the two majority judges in the Circuit Court of Appeals have decided against your petitioner's contention.

4. The decision of the Circuit Court of Appeals is in conflict with the interpretation of the same statute adopted by the Supreme Judicial Court of Massachusetts.

5. The Massachusetts statute is properly applicable in the District Court for the District of Massachusetts and is not in conflict with any Act of Congress.

6. The appearance of justice to your petitioner under the peculiar circumstances of this case requires review of the decision of the Circuit Court of Appeals.

In support of these contentions the petitioner respectfully submits its brief herewith.

WHEREFORE your petitioner prays that this Honorable Court will grant its writ of certiorari, directed to said Circuit Court of Appeals for the First Circuit, requiring the complete record of this cause in said court to be certified to this Court in accordance with the Act of Congress so providing, and that this Court will thereupon proceed to review the case, correct the errors therein, and give your petitioner such other and further relief as to the Court may seem proper in the premises.

FRANK L. YOUNG COMPANY,
By JOHN G. PALFREY,
Attorney and Counsel for Petitioner.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

BOSTON, *September* 15, 1930.

I, John G. Palfrey, being duly sworn, say that I have been of counsel for Frank L. Young Company, the petitioner herein named; that I have read the petition by me subscribed, and that the facts stated therein are true to the best of my knowledge and belief.

JOHN G. PALFREY.

Subscribed and sworn to before me this fifteenth day of September, 1930.

[SEAL.] ROBERT J. PLUNKETT,
Notary Public.

My commission expires May 22, 1936.

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CHARLES ELMORE CR
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 490

FRANK L. YOUNG COMPANY, PETITIONER,

vs.

McNEAL-EDWARDS COMPANY.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

JOHN G. PALFREY,
W. BARTON LEACH,
CHARLES F. ALBERT,
Counsel for Petitioner.

(35,412)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 490

FRANK L. YOUNG COMPANY, PETITIONER,

vs.

McNEAL-EDWARDS COMPANY, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The opinion of the Circuit Court of Appeals upon rehearing dealing with the jurisdictional question here presented is as yet unreported and appears at pages 98 to 114 of the Record. The dissenting opinion of Anderson, J., filed September 16, 1930, appears at pages 114 to 116 of the Record. The memorandum opinion of Lowell, District Judge, denying the motion to dismiss on jurisdictional grounds is unreported

and appears at page 81 of the Record. The motion in arrest of judgment on the same ground and denial thereof by Morton, District Judge, appears at pages 15 and 16 of the Record. The first opinion of the Circuit Court of Appeals (now withdrawn), dealing primarily with questions of contract and not with questions presented on this petition, is reported in 35 Federal, 2nd, 829, and appears at pages 87 to 91 of the Record.

Jurisdiction.

The judgment of the Circuit Court of Appeals on rehearing was entered on July 1, 1930 (Record, p. 94). This petition is brought pursuant to Act of Congress of February 13, 1925, Chapter 229, Sections 1 and 8; United States Code, Title 28, Sections 347A and 350. The petition is properly brought within three months of the date of decision on rehearing.

Morse v. United States, 270 U. S. 151.
Citizens Bank v. Opperman, 249 U. S. 448.

Careful examination of the opinion of the Circuit Court of Appeals indicates the possibility of doubt whether that court decided that the Massachusetts statute was unconstitutional or merely that it was inapplicable in the Federal courts. We believe that the court decided merely that the statute was inapplicable in the Federal courts, even though the effect of this decision is to render the statute a dead letter. In view of the possibility of our being wrong in this belief, counsel for the petitioner directed an application for an appeal to Bingham, Circuit Judge. The applica-

tion was denied by Bingham, J., whose statement in denying the application apparently confirms our belief. Bingham, J. said:

> "The question of the validity or constitutionality of the state statute is not presented in the case and was not decided. This being so, no right of appeal to the Supreme Court exists and the application for an appeal is denied."

The Question Presented.

The respondent, a nonresident of Massachusetts, brought suit against the petitioner in the United States District Court for the District of Massachusetts. The petitioner brought the present cross-action against the respondent relating to the same contract as the respondent's original action. In this cross-action the petitioner sought to obtain jurisdiction over the respondent by service upon his attorney of record in accordance with Massachusetts General Laws, c. 227, ss. 2 and 3. These sections read as follows:

> "SECTION 2. If an action is brought by a person not an inhabitant of the commonwealth or who cannot be found herein to be served with process, he shall be held to answer to any action brought against him here by the defendant in the former action, if the demands are of such a nature that the judgment or execution in the one case may be set off against the judgment or execution in the other. If there are several defendants in the original action, each of them may bring such cross action against the original plaintiff and may be allowed to set off his judg-

ment against that which may be recovered against him and his co-defendants in like manner if the latter judgment had been against him alone.

"SECTION 3. The writ in such cross action may be served on the attorney of record for the plaintiff in the original action, and such service shall be as valid and effectual as if made on the party himself in the commonwealth."

The question is whether these sections are constitutional and applicable in the United States District Court for the District of Massachusetts and whether jurisdiction over the respondent could thus be obtained by service upon its attorney of record.

Statement of the Case.

In January, 1922, the petitioner bought of the respondent about $18,000 worth of fish oil (Record, pp. 18 to 20) and undertook to return, freight prepaid, the drums in which the oil was shipped. Dispute arose as to the quality of the oil and the promptness with which the drums were returned. The respondent, a Virginia corporation, nonresident in Massachusetts, brough suit in the District Court for the District of Massachusetts to recover for alleged delay in returning the drums. Since the petitioner was a Massachusetts corporation the respondent obtained personal jurisdiction. Thereupon the petitioner (discontinuing a similar suit in which property of nominal value had been attached and was the sole basis of jurisdiction) brought the present cross-action to re-

cover damages for defective quality of the oil in the District Court for the District of Massachusetts (Record, pp. 17-18). Under *Massachusetts General Laws*, c. 227, §§ 2 and 3, heretofore quoted, the petitioner served process upon respondent's counsel of record. Respondent's motion to dismiss on the ground that jurisdiction was not thereby obtained was denied (Record, p. 81). A verdict for $10,730.17 for the petitioner was rendered in the present action and a verdict for $100 in favor of the respondent in its action against the petitioner (Record, p. 71). Respondent's motion in arrest of judgment on the ground that jurisdiction over the respondent had not been obtained was denied (Record, p. 15 and p. 16). On Appeal the Circuit Court of Appeals for the First Circuit reversed the judgment and ordered judgment for the respondent on the ground that petitioner's unreasonable failure to return the drums (which by the jury's verdict damaged respondent $100) as matter of law precluded any recovery by petitioner for respondent's breach of contract (Record, pp. 87 to 91). A petition for rehearing on the ground that the decision of the Circuit Court of Appeals was unsupported either by the Record or by the law (Record, pages 91 to 93) was granted (Record, p. 93). After reargument the Circuit Court of Appeals ordered the case dismissed for want of jurisdiction on the ground that General Laws, c. 227; ss. 3 and 4, were inapplicable to proceedings in the United States District Court for the District of Massachusetts (Record, pages 94 to 114). Anderson, Circuit Judge, dissented. This second decision of the Circuit Court

of Appeals by a divided court raises the question upon which certiorari is primarily sought.

It should be added that the idea that these statutes are inapplicable in this proceeding is entirely original with the two majority judges of the Circuit Court of Appeals. For forty years these statutes have been applied in the District Court for the District of Massachusetts and their application acquiesced in, at least tacitly, by the Circuit Court of Appeals for the First District. Neither counsel questioned the applicability of these statutes.

Specification of Errors.

Petitioner claims that the Circuit Court of Appeals for the First Circuit erred—

First, in holding that Massachusetts General Laws, c. 227, ss. 2 and 3, are not applicable to actions in the United States District Court for the District of Massachusetts.

Second, in refusing to follow the interpretation of said statute by the highest court of the Commonwealth of Massachusetts, which has declared it to be a part of the law of set-off and counterclaim.

ARGUMENT.

1. The decision of the Circuit Court of Appeals nullifies the effect of an important Massachusetts statute that has been in continuous and useful operation for more than a century.

The statutes which now appear as Massachusetts General Laws, c. 227, ss. 2 and 3, were originally en-

acted in 1823 and have remained substantially unchanged since that time. The statute is obviously important. It deals with the situation where a nonresident brings suit within the jurisdiction against a resident over whom personal jurisdiction can be obtained. It compels the pursuing nonresident to submit to cross-actions on the part of the pursued resident. In the absence of some such statutory provision there is no means of litigating both sides of controversies between these parties at once or of avoiding the injustice implicit in permitting the nonresident to bring suit and recover judgment while himself staying beyond the jurisdiction of the court. This Court has expressed its disapproval of "the pernicious doctrine of allowing a citizen of a distant State to institute in these courts a suit against a citizen of the State where the court is held and escape the liability which he laws of the State have attached to all plaintiffs."

Chicago & N. W. Railway v. Lindell, 281 U. S. 14, 17.

Partridge v. Insurance Company, 15 Wall. 573, 579.

As hereafter pointed out, this statute is copied in numerous States. Moreover, it was early decided that this statute was applicable in the Federal courts.

Arkwright Mills v. Aultman & Taylor Machinery Co., 128 Fed. 195 (Circuit Court, District of Mass., 1904).

It has been in salutary use ever since and until the present decision of the Circuit Court of Appeals.

The effect of the decision of the Circuit Court of Appeals is to nullify this statute in every controversy in excess of $3,000. By its terms the statute is applicable only to cross-action of residents against nonresidents. Under the decision of the Circuit Court of Appeals the nonresident, by suing in the Federal court, can prevent a resident plaintiff from enjoying the benefits of the statute. Plainly, a nonresident against whom the possibility of cross-action exists will always choose the Federal courts where the claim is for more than the amount necessary to invoke jurisdiction based upon diversity of citizenship. Even if the nonresident brings suit in the State courts, he will be able to remove the cross-action brought under the Massachusetts statute and thus obtain the benefit of the Circuit Court of Appeals' decision. The nullification of the Massachusetts statute is complete with regard to controversies over $3,000. The increase of diversity-of-citizenship litigation to be expected in the Federal courts is considerable.

2. The decision of the Circuit Court of Appeals, if followed, also nullifies similar statutes of six other States.

The Massachusetts statute is not alone to suffer from the present decision. Maine and Rhode Island have statutes which are practically identical. *Revised Laws of Maine*, 1916, c. 86, § 80. *General Laws of Rhode Island*, §§ 4927 to 4929; c. 338, §§ 14 to 16. Since both Maine and Rhode Island are in the First Circuit, these statutes necessarily fall under the present decision.

Four other states outside the First Circuit have statutes which, although not identical, are substantially the same as the Massachusetts statutes in that they permit service of process upon the attorney for nonresident plaintiffs.

Alabama, Civil Code, Sec. 10181.
California, Code of Civil Procedure, Sec. 1015.
Idaho, Compiled Statutes (1919), Sec. 6699.
See *Collins v. Brown*, 19 Ida. 360, 364.
Montana, Code of Civil Procedure, Sec. 9151.

If the decision of the Circuit Court of Appeals is followed in other circuits, these statutes necessarily also fall.

The statutes in question are essential parts of the procedural system of seven states. The decision sought to be reviewed nullifies them. It is suggested that the question raised is of sufficient importance to justify decision by this Honorable Court.

3. Of the seven United States Judges who have passed directly upon the question here involved, only the two majority judges in the Circuit Court of Appeals have decided against your petitioner's contention.

The applicability of the statute in question in the Federal courts was first considered in *Arkwright Mills v. Aultman & Taylor Machinery Co.*, 128 Fed. 195. In that case Francis C. Lowell, District Judge, ruled that the statute was applicable. On appeal to the Circuit Court of Appeals no question was raised as to the applicability of the statute. *Arkwright Mills*

v. Aultman & Taylor Machinery Co., 145 Fed. 783. The question was next considered in *Coleman v. American Warp Co.*, 235 Fed. 531, 536, where Dodge, Circuit Judge, upheld the applicability of the statute. In the present case Lowell, District Judge, ruled the statute to be applicable by denying respondent's motion to dismiss (Record, pages 7 and 8) and Morton, District Judge, made the same ruling by denying the respondent's motion in arrest of judgment (Record, pages 15 and 16). In the Circuit Court of Appeals, Anderson, Circuit Judge, dissented from the opinion to which this petition refers. It thus appears that of the seven judges who have considered the question, only the present majority in the Circuit Court of Appeals (Bingham and Wilson, JJ.) have ruled against the applicability of the statute. It seems unfortunate that so important a question should be finally decided against the great weight of judicial utterances by reason of the fortuitous circumstance that the minority are the last in time to pronounce upon it. Such a situation seems appropriate for the intervention of the Honorable Court on writ of certiorari.

4. The decision of the Circuit Court of Appeals is in conflict with the interpretation of the same statute adopted by the Supreme Judicial court of Massachusetts.

The Maine and Rhode Island similar statutes are both contained in the general statute concerning set-off and counterclaim. The same is true of the early compilations of Massachusetts statutes, although in the

present compilation these sections are given a chapter to themselves. Furthermore, the Massachusetts Supreme Judicial Court has interpreted these sections as a part of the law of set-off and counterclaim. Speaking through its then Chief Justice, now Mr. Justice Holmes, it said, in *Aldrich v. E. W. Blatchford & Co.*, 175 Mass. 369:

> "* * * we cannot bring ourselves to doubt the validity of the statute in question. If a State law provided that in all cases all cross demands should be open, an entirely possible piece of legislation, no one would doubt the constitutionality of the law. No service would be necessary in order to entitle the defendant to judgment if on a general taking of accounts he came out ahead. We do not suppose that the legislation would be any worse if it made service of a writ on the plaintiff's attorney a condition of the cross judgment."

This interpretation of the Massachusetts statute was followed in the decision under which the statute had been for years applied in the District Court for the District of Massachusetts. *Arkwright Mills v. Aultman & Taylor Machinery Co.*, 128 Fed. 195. Still more significant, the identical Maine statute has been declared *by the same Circuit Court of Appeals, and within two years,* to be part of the law of set-off. *Champlin Refining Co. v. Gasoline Products Co.*, 29 Fed., 2d, 331, 338.

In spite of this uniform method of interpretation of the statute in question, the opinion of the Circuit Court of Appeals declares that the statute is not a part

of the law of set-off (Record, pages 111 to 113), and therefore not applicable in Massachusetts Federal courts. It is suggested that review by this Court is appropriate where there is patent disregard by lower Federal courts of the interpretation placed upon State statutes by the highest courts of the State.

Elmendorf v. Taylor, 10 Wheat. 152, 159.
Jones v. Prairie Oil Co., 273 U. S. 195.

5. The Massachusetts statute is properly applicable in the District Court for the District of Massachusetts and is not in conflict with any Act of Congress.

The argument for the petitioner on the jurisdictional question is forcefully put by Judge Anderson in his dissenting opinion (Record, pages 114 to 116). Only a few additional considerations will be suggested.

The elements of jurisdiction prescribed by Congress are all present in this case. The action is between citizens of different States and the need in controversy exceeds $3,000. *United States Code, Title* 28, *Section* 41. Suit is brought "in the District of the residence of either the plaintiff or the defendant." *United States Code, Title* 28, *Section* 112.

The sole contention is that service of process upon respondent's attorney of record is not sufficient to give the District Court jurisdiction over the respondent. Yet it is familiar law that State statutes rendering the Commissioner of Corporations or other official an agent for service of process upon foreign corporations are effective in the Federal courts, and that in Federal courts suits service upon such statutory agent is suffi-

cient to give jurisdiction. *Barrows Steamship Co. v. Kane,* 170 U. S. 100.

It is beyond question that if the Massachusetts statute had permitted counterclaim in the same action with the right of an affirmative judgment to the counter-claimant, without service of process, the statute would have been applicable without new service of process in the Federal courts both before and since the Conformity Act.

United States Code, Title 28, *Section* 724.
Dushane v. Benedict, 120 U. S. 630.
West v. Aurora City, 6 Wall. 139.
Dotson v. Kirk, 180 Fed. 14.

The Massachusetts statute, however, reaches this result by requiring a new service of process upon the nonresident plaintiff's attorney of record. The difference has seemed to five of the seven judges who have considered it too small to justify the drawing of a distinction.

The statute should be held applicable as a part of the law of set-off and counterclaim.

Arkwright Mills v. Aultman & Taylor Machinery Co., 128 Fed. 195.
Champlin Refining Co. v. Gasoline Products Co., 29 Fed., 2d, 331, 338.

The Massachusetts practice does nothing more than apply to actions at law the long-settled equity practice of permitting substituted service on cross-bills.

Gregory v. Pike, 29 Fed. 538.
Kelley v. Smith Co., 196 Fed. 466, 470.

The holding that the statutes here in question are inapplicable in the Federal courts blasts a formidable hole in the procedural system of the seven States involved. It furthers the "pernicious doctrine of allowing a citizen of a distant State to institute in these courts a suit against a citizen of the State where the court is held and escape the liability which the laws of the State have attached to all plaintiffs." *Chicago & N. W. Railway v. Lindell*, 281 U. S. 14, 17; *Partridge v. Insurance Company*, 15 Wall. 573, 579. It reaches the absurd result of giving effect to statutes which require no more than notice in the original action for the bringing of all manner of cross-claims, while denying effect to statutes which require service of process in the same situation. It tends to defeat the policy of every modern court to secure complete justice in a single court at the same time.

> "A modern court should strive to do complete justice; a partial and incomplete adjudication tends only to protract and complicate litigation to the detriment of all concerned."

Per Mack, Circuit Judge, in *The Gloria*, 286 Fed. 188, 192.

6. The appearance of justice to your petitioner under the peculiar circumstances of this case requires review of the decision of the Circuit Court of Appeals.

This case is perhaps unique in that, although it was twice extensively argued and briefed before the Circuit Court of Appeals for the First Circuit, both opinions of the said court treated only of matters not

raised by either counsel. The first opinion of the Circuit Court of Appeals (Record, pages 87 to 91) reversed the judgment of the District Court on the ground that there had been an intentional breach of contract by the petitioner in retaining the drums in which the oil was shipped until September 15, 1922. No such contention was ever made by respondent's counsel and the record was devoid of evidence to support such a contention. A petition for rehearing based upon the absence from the Record of any such evidence was necessarily granted. Again the case was extensively argued, both counsel assuming on the basis of the decision in *Arkwright Mills v. Aultman & Taylor Machinery Co.*, 128 Fed. 195, and the long-continued practice in the Massachusetts Federal courts that the Massachusetts statute here in question was applicable. No member of the court suggested any doubts on this question. Yet the decision rests upon this point alone, which counsel have never had the opportunity to argue. It is easy to understand the bewilderment of the officers of the Frank L. Young Company, who know that they were awarded a verdict of over $10,000 in the District Court, when they are told that twice they have been defeated in the Circuit Court of Appeals on grounds not raised by opposing counsel and never mentioned by the court until pronouncement of final decision. It is suggested that the appearance of orderly justice to your petitioner in the United States courts renders appropriate the issuance of a writ of certiorari in this case.

Because of the foregoing considerations, and also because of the general importance of the substantive

question of contract law here involved, it is further suggested that review on certiorari should not be limited solely to the jurisdictional question, but should be granted in such form as to permit final disposition in the Honorable Court.

Conclusion.

Wherefore, your petitioner respectfully prays that its petition for writ of certiorari herewith submitted may be granted.

Respectfully submitted,

JOHN G. PALFREY,
W. BARTON LEACH,
CHARLES F. ALBERT,
Counsel for Petitioner.

(6146)

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CHARLES ELMORE CRO
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In the

Supreme Court of the United States.

October Term, 1930.

No. 490.

Frank L. Young,
Petitioner,

v.

McNeal-Edwards Company.

On writ of certiorari to the United States Circuit Court of Appeals for the First Circuit.

BRIEF FOR PETITIONER.

JOHN G. PALFREY,
W. BARTON LEACH,
Attorneys for Petitioner.

CHARLES F. ALBERT,
Of Counsel.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

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In the

Supreme Court of the United States.

OCTOBER TERM, 1930.

No. 490.

FRANK L. YOUNG COMPANY,

PETITIONER,

v.

McNEAL-EDWARDS COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR PETITIONER.

OPINIONS BELOW.

The majority opinion of the Circuit Court of Appeals upon rehearing, from which the petition for certiorari was directly prosecuted, appears at 42 F. (2d) 363 (R. 92-112). The dissenting opinion of Anderson, J., appears at 43 F. (2d) 99 (R. 112-114). The majority opinion sustained the defendant's objection to the jurisdiction, which had thrice been overruled in the District Court. The two memorandum opinions of Lowell, District Judge (R. 82), and the ruling of Morton, District Judge (R. 14-15), are unreported.

The first opinion of the Circuit Court of Appeals (now superseded), dealing with questions of contract on the merits, is reported in 35 F. (2d) 829 (R. 86-89).

JURISDICTION.

The judgment of the Circuit Court of Appeals on rehearing was entered on July 1, 1930 (R. 92). By its judgment and in its opinion the Circuit Court of Appeals ruled that Massachusetts General Laws, chapter 227, sections 2 to 4, are inapplicable in the United States District Court for the District of Massachusetts, and that therefore the District Court had no jurisdiction of this action (R. 109). This petition was brought pursuant to Act of Congress of February 13, 1925, chapter 229, sections 1 and 8; United States Code, title 28, sections 347A and 350. The petition was filed September 29, 1930, and was properly brought within three months of the date of decision on rehearing.

Morse v. *United States*, 270 U.S. 151 (1926).
Citizens Bank v. *Opperman*, 249 U.S. 448 (1919).

Careful examination of the opinion of the Circuit Court of Appeals indicates the possibility of doubt whether that court decided that the Massachusetts statute was unconstitutional or merely that it was inapplicable in the Federal courts. We believe that the court decided merely that the statute was inapplicable in the Federal courts, even though the effect of this decision is to render the statute a dead letter. In view of the possibility of our being wrong in this belief, counsel for the petitioner directed an application for an appeal to Bingham, Circuit Judge. Judge Bingham's statement in denying the application apparently confirms our belief:

> "The question of the validity or constitutionality of the state statute is not presented in the case and was not decided. This being so, no right of appeal to the

Supreme Court exists and the application for an appeal is denied" (R. 114-115).

The petition for certiorari was allowed November 24, 1930 (R. 115).

QUESTIONS PRESENTED.

(1) The respondent, a non-resident of Massachusetts, brought suit against the petitioner in the United States District Court for the District of Massachusetts. The petitioner brought the present cross-action against the respondent, relating to the same contract as the respondent's original action. In this cross-action the petitioner sought to obtain jurisdiction over the respondent by service upon his attorney of record in accordance with Massachusetts General Laws, chapter 227, sections 2 to 4. These sections read as follows:

"SECTION 2. If an action is brought by a person not an inhabitant of the commonwealth or who cannot be found herein to be served with process, he shall be held to answer to any action brought against him here by the defendant in the former action, if the demands are of such a nature that the judgment or execution in the one case may be set off against the judgment or execution in the other.* If there are several defendants in the original action, each of them may bring such cross action against the original plaintiff and may be allowed to set off his judgment against that which may be recovered against him and his co-defendants in like manner as if the latter judgment had been against him alone.

"SECTION 3. The writ in such cross action may be served on the attorney of record for the plaintiff in the original action, and such service shall be as valid and

* As to when executions may be set off, see General Laws, chapter 235, section 27, quoted and discussed *infra*, p. 20.

effectual as if made on the party himself in the commonwealth.

"SECTION 4. The court in which either of the actions is pending may order continuances to enable the absent party to defend the action brought against him, and to enable either party to set off his judgment or execution against that which is recovered against him, but the actions shall not be unreasonably delayed by the neglect or default of either party. The provisions of the following sections, relative to actions against persons absent from the commonwealth, shall not apply to a cross action brought under the two preceding sections."

The first and principal question is whether these sections are constitutional and applicable to actions in the District Court for the District of Massachusetts, and whether jurisdiction over the respondent could thus be obtained by service upon its attorney of record. This question is dealt with at pages 5 to 34 of this brief.

(2) If the court rules that the District Court was correct in applying the Massachusetts statute, and that the Circuit Court of Appeals was in error in reversing the District Court ruling, the respondent presses a question as to construction of the Massachusetts statute. The contention is that Frank L. Young Company cannot take advantage of the statute in this case because it previously brought and discontinued another action against McNeal-Edwards Company. This question is dealt with at pages 34 to 43 of this brief.

(3) If the court rules that the District Court had jurisdiction of this cause, the respondent presses a claim that judgment on the merits should have been rendered in its favor on the ground that Frank L. Young Company had committed an intentional breach of the contract upon which this action is based and was thereby precluded from recovery. This question is treated at pages 43ff. of this brief.

FIRST QUESTION: APPLICABILITY OF MASSACHUSETTS STATUTE IN FEDERAL COURTS.

STATEMENT OF THE CASE RELATING TO FIRST QUESTION.

At this point only those facts are stated which bear upon the first question—*i.e.*, the applicability of General Laws, chapter 227, sections 2 to 4, in the District Court for the District of Massachusetts. Additional facts bearing only on the other two questions will be found at pages 34 and 43 of this brief.

In January, 1922, the petitioner bought of the respondent about $18,000 worth of fish oil (R. 18-19) and undertook to return, freight prepaid, the drums in which the oil was shipped. Disputes arose as to the quality of the oil and the promptness with which the drums were returned. The respondent, a Virginia corporation, non-resident in Massachusetts, brought suit in the District Court for the District of Massachusetts to recover for alleged delay in returning the drums. Since the petitioner was a Massachusetts corporation, the respondent obtained personal jurisdiction. Thereupon the petitioner (discontinuing a similar suit in which property of insufficient value had been attached and was the sole basis of jurisdiction) brought the present cross-action to recover damages for defective quality of the oil in the District Court for the District of Massachusetts (R. 16-17). Under Massachusetts General Laws, chapter 227, sections 2 and 3, heretofore quoted, the petitioner caused process to be served upon respondent's counsel of record. Respondent's motion to dismiss and plea in abatement on the ground that jurisdiction was not thereby obtained were denied (R. 82). A verdict for $10,730.17 for the petitioner was rendered in the present action and a verdict for $100 in favor of the respondent in its action against the petitioner (R. p. 71). Respondent's motion in arrest of judgment on the ground that jurisdiction had not been obtained was denied (R. 14-15). On appeal, the Circuit Court of Appeals

for the First Circuit reversed the judgment and ordered judgment for the respondent on the ground that petitioner's unreasonable detention of the drums (which by the jury's verdict damaged respondent $100) as matter of law precluded any recovery by petitioner for respondent's breach of contract (R. 86-89). A petition for rehearing on the ground that the decision of the Circuit Court of Appeals was unsupported either by the record or by the law (R. 90-91) was granted (R. 92). After reargument the Circuit Court of Appeals ordered the case dismissed for want of jurisdiction,* on the ground that General Laws, chapter 227, sections 2 to 4, were inapplicable to proceedings in the District Court for the District of Massachusetts (R. 92-112). Anderson, Circuit Judge, dissented (R. 112-114). This second decision of the Circuit Court of Appeals by a divided court raises the first and principal question of this case.

It should be added that the idea that these statutes are inapplicable in this proceeding is entirely original with the two majority judges of the Circuit Court of Appeals. "From time immemorial" (R. 112) these statutes have been applied in the District Court for the District of Massachusetts and their application acquiesced in, at least tacitly, by the Circuit Court of Appeals for the First Circuit. Neither counsel questioned the applicability of these statutes.

SPECIFICATION OF ERRORS.

Petitioner claims that the Circuit Court of Appeals for the First Circuit erred—

First, in holding that Massachusetts General Laws, chapter 227, sections 2 and 3, are not applicable to actions in the United States District Court for the District of Massachusetts.

Second, in refusing to follow the interpretation of said statute by the highest court of the Commonwealth of Massa-

* Of course the judgment of dismissal was a final disposition of the litigation, since the statute of limitations had run on the cause of action.

chusetts, which has declared it to be a part of the law of set-off and counterclaim.

SUMMARY OF ARGUMENT ON FIRST QUESTION.

The petitioner contends that the practice of the District Court for the District of Massachusetts "from time immemorial" (R. 112) in applying the Massachusetts statute in question to proceedings in that court is correct.

The statute provides for a constitutional exercise of jurisdiction. By invoking the jurisdiction of the courts of a sovereign, a plaintiff submits to the jurisdiction of those courts with reference to cross-claims of the person sued. That the cross-claim is prosecuted by a separate service of process rather than by a counterclaim in the same proceeding is a matter of procedural convenience not touching the power of the sovereign. The method of service upon counsel of record, provided by the statute, is reasonably calculated to afford notice of the cross-claim. In equity substituted service of cross-bills upon complainant's attorney has long been familiar.

The statute, as a provision for service of process, is part of the "practice and forms and modes of proceeding in civil causes" of Massachusetts and is thus incorporated into the practice of the District Court for the District of Massachusetts by the Conformity Act.

More particularly, the statute is part of the Massachusetts procedural system of set-off and counterclaim. Except for the rare case in which the cross-claims are both liquidated, the Massachusetts statutes have no provision for set-off or counterclaim *within the same action* with right of affirmative judgment for the defendant. Other types of cross-claims (including the types existing between the parties to this proceeding—*i.e.*, unliquidated claims arising out of the same transaction) are provided for by cross-actions with separate docket entries, followed by set-off of the ex-

ecutions obtained therein. The statute in question provides for such cross-actions and set-off of executions in the case of non-residents. As part of the state law of set-off and counterclaim, it becomes part of the practice of the District Court in Massachusetts under the Conformity Act. If this statute does not become part of such practice, the United States District Court for the District of Massachusetts is administering a system of set-off and counterclaim more incomplete and archaic than that of any other Anglo-American jurisdiction.

The two majority judges of the Circuit Court of Appeals, in ruling that this statute was inapplicable in the Federal courts, misunderstood the nature of the Massachusetts statutes (neither of these judges is from Massachusetts; the single Massachusetts member on the court dissented) and misconstrued the decisions of this Court declaring that state legislation cannot enlarge or abridge the jurisdiction of the Federal courts.

ARGUMENT ON FIRST QUESTION.

I.

The Massachusetts Statute is Constitutional.

As heretofore pointed out (*supra*, p. 2) the Circuit Court of Appeals has expressly declared that it did not decide that the Massachusetts statute was unconstitutional (R. 114-115). But doubts as to the constitutionality of these statutes expressed in the majority opinion (R. 109) render brief discussion of the constitutional question appropriate.

The statute declares that where a non-resident brings suit within the jurisdiction he thereby becomes liable to an action brought by the defendant whom he has sued, provided that the executions in the two actions can be set off against each other. The only effect of this proviso is to require that both actions deal with the same persons in the same capacities. Thus if the defendant were sued as trustee or execu-

tor, he would not be entitled to bring a cross-action in his personal capacity.

Holbrook v. *Lackey*, 13 Metc. 132, 135 (1847).

Apart from this limitation, the statute subjects the non-resident plaintiff to all cross-claims of the defendant, whether or not liquidated, and whether or not arising out of the same transaction. It is prescribed that service of process in this cross-action shall be upon the non-resident's attorney of record.

Due Process. The Circuit Court of Appeals seemed to conclude that, on the authority of *Riverside Mills* v. *Menefee*, 237 U.S. 189 (1914), these sections violated the due-process clause of the Fourteenth Amendment by sanctioning an unconstitutional exercise of jurisdiction by Massachusetts courts. Of course, if the Circuit Court of Appeals is right, the statute cannot be applied even in the state courts of Massachusetts, and the decision of Mr. Justice Holmes, then Chief Justice of Massachusetts, in *Aldrich* v. *Blatchford*, 175 Mass. 369 (1900), upholding the statute as constitutional was wrong. And the following statutes of other states also fall:

Revised Statutes of Maine, 1930, c. 95, §85.
General Laws of Rhode Island, §§ 4927-4929 (c. 338, §§ 14-16).
Alabama, Civil Code, §10181.
California, Code of Civil Procedure, §1015.
Idaho, Compiled Statutes, 1919, §6699.
See *Collins* v. *Brown*, 19 Idaho, 360, 364 (1911).
Montana, Code of Civil Procedure, §9151.

We are convinced that the statute is constitutional. Where a person, even a non-resident, invokes the jurisdiction of the courts of a sovereign against a defendant, it has always been recognized that, if the statutes of the forum so

provide, an affirmative money judgment against the non-resident may be rendered in favor of the defendant upon any cross-claim the defendant may possess. The basis of this jurisdiction of a sovereign over suitors in its courts has been stated in this Court and elsewhere.

> "By setting up its counterclaim the defendant became a plaintiff in its turn, invoked the jurisdiction of the court in the same action and by invoking submitted to it. . . . the defendant, if he elects to sue upon his claim in the action against him, assumes the position of an actor and must take the consequences."
>
> Per Holmes, J., in *Merchants Heat & Light Co.* v. *Clow & Sons*, 204 U.S. 286, 289, 290 (1907).

See also *American Mills Co.* v. *American Surety Co.*, 260 U.S. 360, 366 (1922).

> "When it brings suit in a court administering a procedure which admits of the filing of counterclaims, it is also prima facie subject to the jurisdiction of that court as respects any counterclaims permitted under its practice. To file the action is to accept the consequences which it may have in the place where it is filed, including such affirmative relief as is there allowed."
>
> Per Learned Hand, D.J., in *Kunglig Jarnvagsstyrelsen* v. *Dexter & Carpenter*, 300 Fed. 891, 892 (S.D. N.Y. 1924).

"SECTION 89. JURISDICTION OVER PLAINTIFF.

"A plaintiff by bringing an action in a state subjects himself to the jurisdiction of the state as to the claim sued upon, and, if the law of the state so provides at the time the plaintiff brings his action, as to any set-off, counterclaim or cross-action brought against him by the defendant.

COMMENTS:

. . . . . .

"c. A state may provide that a non-resident who brings an action in a court of the state shall be held to answer to any action brought against him by the defendant. A judgment rendered against such a non-resident in such a cross-action is valid whether rendered by the same court in which he brought the original action or by another court of the same state, and although he was not otherwise subject to the jurisdiction of the state.

"The rendition of such a judgment by a court of a State is not a violation of the Fourteenth Amendment to the Constitution of the United States."

American Law Institute, Restatement of the Law of Conflict of Laws (1930).

This basis of jurisdiction has been fully recognized in the Roman Law and modern Civil Law.

Code, 7.45.14. Cf. Dig. 2.1.11.1; 5.1.2.5.

Civilprozessordnung (German Republic, 1924), §33. 3, Glück, Ausfürliche Erläuterung der Pandecten nach Hellfeld, ein Commentar, §§ 204-207.

Appleton, Histoire de la Compensation en Droit Romain, 222-223.

Even a sovereign suing in his own courts may be compelled to do full justice to the defendant who holds a cross-claim.

United States v. *The Thekla*, 266 U.S. 328, 339 (1924).

The Gloria, 286 Fed. 188 (S.D. N.Y. 1923).

Compare:

The Newbattle, 10 P.D. 33 (1885).

Duke of Brunswick v. *King of Hanover*, 6 Beav. 1, 37, 38 (1844).

Beale, Jurisdiction over Foreigners, 26 Harv. L. Rev. 283, 298-299.

This Court has already sanctioned set-off and counterclaim statutes which permit the defendant to assert cross-claims not arising out of the same transaction—

Dushane v. *Benedict,* 120 U.S. 630 (1877);
Pacific Express Co. v. *Malin,* 132 U.S. 531, 537 (1889);
Higgins v. *McCrea,* 116 U.S. 671, 684 (1886)—

as well as the usual statutes permitting affirmative judgments for the defendant—

Clement v. *Field,* 147 U.S. 467 (1892);
Railroad v. *Smith,* 21 Wall. 255 (1874)—

and cases allowing recoupment for tort in contract actions.

Dushane v. *Benedict, supra.*

In all of these cases the actual set-off or counterclaim before the Court arose out of the same transaction as the plaintiff's claim, although the statutes permitted assertion of cross-claims not so arising. In the fact that these cases make less broad use of the statutes than would have been possible, they resemble the case now before the Court.

It is particularly noteworthy that in *Higgins* v. *McCrea, supra,* this Court was dealing with an Ohio statute (Throckmorton's Code, 1930, §11,337), which provided that upon motion of either party the counterclaim could be turned into a separate suit, and that in the opinion of Woods, J., at p. 683, the reasoning of the Court is based upon the fact that the Ohio counterclaim is in substance a distinct cross-action.

The only difference between a broad counterclaim statute in the orthodox form (whose constitutionality would scarcely be contested) and the Massachusetts statute here in question is that in Massachusetts the cross-claim proceeds upon

a separate service of process and results in a separate judgment. Where the plaintiff could be forced to defend a counterclaim pleaded to his action, the mere fact that the foundation for the counterclaim is laid by a separate service instead of a pleading in the original action does not touch the power of the court to adjudicate the claim. This concerns only the method in which the court exercises the power it has.

> "If a State law provided that in all cases all cross demands should be open, an entirely possible piece of legislation, no one would doubt the constitutionality of the law. No service would be necessary in order to entitle the defendant to judgment if on a general taking of accounts he came out ahead. We do not suppose that the legislation would be any worse if it made service of a writ on the plaintiff's attorney a condition of the cross judgment."
>
> Per Holmes, C.J., in *Aldrich* v. *Blatchford & Co.*, 175 Mass. 369, 372 (1900).

Of course, no reliance is placed upon cases justifying the exercise of jurisdiction over foreign corporations in whole or in part upon the ability to exclude the foreign corporation.

> *Pennsylvania Fire Insurance Co.* v. *Gold Issue Mining Co.*, 243 U.S. 93, 96 (1917).
>
> Cf. *Hess* v. *Pawloski*, 274 U.S. 352, 356 (1927).

Plainly, there is no power to exclude foreign corporations from the Federal courts. Moreover, the Massachusetts statute here in question should be justified on grounds applicable equally to individuals and corporations.

It being established that the sovereign whose jurisdiction is invoked by the non-resident plaintiff has jurisdiction over him with reference to cross-claims, the method of exercise of the jurisdiction provided by the statute in question is rea-

sonable. Notice to or service upon his attorney of record is obviously calculated to bring the cross-claim to the attention of the non-resident. Such substituted service has long been the accepted practice in equity in the Federal courts with reference to cross-bills; and this practice has never been questioned on constitutional grounds.

Gasquet v. *Fidelity Trust Co.*, 57 Fed. 80 (1893, 5th C.C.A.).

Kelley v. *Smith Co.*, 196 Fed. 466 (1912, 7th C.C. A.).

See also:

Chesapeake & Ohio Ry. Co. v. *Swayze*, 60 N.J. Eq. 417 (1899), per Pitney, V.C.

Collins v. *Brown*, 19 Idaho, 360, 364 (1911).

Equal Protection of the Laws. The Circuit Court of Appeals has further suggested (R. 110-111) that the Massachusetts statute unconstitutionally discriminates against non-residents in that where there are several defendants it permits cross-actions by each of the defendants, whereas similar rights are not given against resident plaintiffs. It is sufficient to say that if this statute is invalid in cases in which several defendants are sued (which is by no means conceded), such invalidity would have no effect upon the application of the statute to the instant case, where there is a single defendant. If a provision as to several defendants is invalid, it is plainly severable, and this defendant can obtain no advantage through asserting the constitutional right of some hypothetical defendant of the future.

It might occur to the Court that the provision for service of process upon the non-resident's attorney is discriminatory, since similar rights are not given against residents. It should suffice to point out that in Massachusetts jurisdiction over a resident can always be obtained, even though he be outside the jurisdiction, by service of process at his last and usual place of abode. General Laws, chapter 223,

section 31. It is the inapplicability of this section to non-residents (General Laws, chapter 227, section 1) that requires some similar procedural remedy against non-resident plaintiffs. This the statute in question affords.

II.

The Massachusetts Statute Prescribes a Method of Service of Process, and as Such is Applicable in the Federal Courts in Massachusetts under the Conformity Act.

The Conformity Act, U.S. Code, title 28, §724, provides that:

> "The practice, pleadings, and forms and modes of proceeding in civil causes, . . . in the District Courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such District Courts are held."

It has always been held that state practice as to service of process is adopted for the Federal courts by the Conformity Act.

> "With regard to the mode of serving mesne process upon corporations and other persons, Congress has not laid down any rule; and hence the state law and practice must be followed. There can be no doubt, we think, that the mode of service of process is within the categories named in the act. It is part of the practice and mode of proceeding in a suit."
>
> *Amy* v. *Watertown*, 130 U.S. 301, 304 (1889).

> "The laws of the State providing for the service of process of the state courts in actions at law furnish the rules for procedure in such cases in this court, so that whatever would be lawful service of process to bring

a party into court, if the action were in a court of competent jurisdiction under the state government, is lawful and sufficient for the purpose in actions commenced in this court."

VanDresser v. *Oregon Railroad &c. Co.*, 48 Fed. 202, 205 (C.C. Wash. 1891).
McCullough v. *United Grocers' Corporation*, 247 Fed. 880, 882 (N.D. Ohio, 1918).
3 Foster, Federal Practice (6th ed.), §455A.

This adoption is not limited to state statutes providing for the usual personal service of process in hand, but extends to such substituted service as a state practice, within the bounds of constitutionality, may prescribe.

King v. *Davis*, 137 Fed. 198 (W.D. Va. 1903).

Of course if a state practice as to service of process is based upon insufficient jurisdiction over the defendant, or if the service of process is not reasonably calculated to give notice of the proceeding to the defendant, the practice is unconstitutional and inapplicable in either Federal or state courts.

Riverside Mills v. *Menefee*, 237 U.S. 189 (1914).
Goldey v. *Morning News*, 156 U.S. 518 (1894).

But subject to these constitutional restrictions, applicable equally in all courts, state practice with regard to service of process is adopted in gross for the Federal courts by the Conformity Act.

It has already been argued (*supra*, pp. 8-15) that the Massachusetts statute is constitutional. If so, the Conformity Act requires its application in the District Court for the District of Massachusetts. It has, in fact, been so applied "from time immemorial" (R. 112).

Arkwright Mills v. *Aultman & Taylor Co.*, 128 Fed. 195 (1904).

Colman v. *American Warp &c. Co.*, 235 Fed. 531, 536 (1915).

E. R. Sherburne Co. v. *Wellenstein, Krause & Co.*, 285 Fed. 793 (1923).

Huntington Manufacturing Co. v. *Bradford Worsted Spinning Co.*, 37 F. (2d) 730 (1915).

III.

The Statute is Part of the Massachusetts Procedural System of Set-Off and Counterclaim and as Such is Adopted for the District Court for the District of Massachusetts by the Conformity Act.

It is significant that every Massachusetts judge or former Massachusetts lawyer who has expressed an opinion with regard to this statute has declared or implied that it was part of the law of set-off and counterclaim of Massachusetts.

Arkwright Mills v. *Aultman & Taylor Co.*, 128 Fed. 195 (1904), per Francis Lowell, D.J.

Aldrich v. *Blatchford*, 175 Mass. 369 (1900), per Holmes, C.J.

McNeal-Edwards Co. v. *Frank L. Young Co.*, 43 F. (2d) 99 (1930) (R. 112, 113), per Anderson, J., dissenting.

The only judicial minds thus far to express a doubt on this point are the majority judges of the Circuit Court of Appeals, who hail respectively from New Hampshire and Maine. One is led to suspect that their view may be connected with an incomplete understanding of the procedural system of which this statute is a part—particularly where, as here, the point was raised by the court *ex proprio motu* without the aid which argument from either counsel might have given.

We believe that the statute in question is part of the Massachusetts law of set-off and counterclaim. We do not think

that this contention is essential to our argument for the application of the statute in the District Court, since we believe that the very simple argument already made, based upon *Amy* v. *Watertown*, 130 U.S. 301, is sufficient; but we do feel that its applicability is clearer, and the results of non-applicability more strikingly undesirable, if the relation between these sections and the law of set-off and counterclaim in Massachusetts is pointed out. For this reason we undertake to set before the Court in some detail the system of cross-claim procedure of which General Laws, chapter 227, sections 2 to 4, are an integral part.

Recoupment. In Massachusetts common-law recoupment is recognized. It has no statutory sanction. The matters set up in recoupment must arise out of the same transaction.

> *Home Savings Bank* v. *Boston*, 131 Mass. 277, 280 (1881).
>
> *Barlow Manufacturing Co.* v. *Stone*, 200 Mass. 158, 160 (1908).
>
> *Knitted Mattress Co.* v. *Griggs*, 154 Mass. 5 (1891).

No affirmative judgment for the defendant is possible.

> *Barnett* v. *Loud*, 226 Mass. 447, 450 (1917).

See also General Laws, c. 106, §58 (1A).

Set-Off. This is, as usual, a statutory matter in Massachusetts. Set-off is permitted only if the plaintiff's claim and the defendant's claim are both liquidated and both constitute contract claims for goods sold, money paid, money had and received, or services performed.

> "If at the commencement of an action upon a judgment or upon a contract, express or implied, for property sold, for money paid, for money had and received, for services performed and for an amount which is liquidated or may be ascertained by calculation, the de-

fendant has in his own right a claim against the plaintiff such as is hereinbefore mentioned or such a claim which has been assigned to him with notice thereof to the plaintiff, it may be set off against the plaintiff's claim as hereinafter provided."

General Laws, c. 232, §1.

By section 11 of the same chapter an affirmative judgment in favor of the defendant is permitted. Plainly, the cases in which such set-off is possible are comparatively rare. The requirement of two liquidated claims of these restricted natures is extraordinarily strict.

Counterclaim by Cross-Action. (*a*) *Residents.* There is no other statute in Massachusetts permitting set-off or counterclaim in the same action. Of course this does not mean that Massachusetts is laboring under a procedural system of the wooden rigidity of General Laws, chapter 232, section 1. In Massachusetts practice cross-claims, for by far the greater part, are prosecuted by instituting cross-actions and then setting off the executions obtained in the two actions. Where the original plaintiff is a resident of the Commonwealth, the courts of the Commonwealth have jurisdiction over him by reason of such residence, even though he be outside the Commonwealth, and the statutes provide that process in actions against him may be served by leaving a copy at his last and usual place of abode or with his agent or tenant.

"If the summons is not served personally on the defendant, the original or a copy, as the case may be, shall be left at his last and usual place of abode, if he has any within the commonwealth known to the officer. If he has none, it shall be left with his tenant, agent or attorney, if he has any within the commonwealth known to the officer."

General Laws, c. 223, §31.

If he has no last and usual place of abode, or agent or tenant, in the Commonwealth, service is authorized in such manner as the court may direct, usually by mail and/or publication.

> "If a defendant . . . is absent from the commonwealth . . . and no personal service has been made on him . . . the court . . . shall order the action to be continued until notice of the action is given in such manner as it shall order."
>
> General Laws, c. 227, §7.
> Cf. General Laws, c. 223, §34.

When judgments and executions are obtained these are set off against each other.

> "Executions between the same parties may, if required by either party, be set off one against the other."
>
> General Laws, c. 235, §27.

The Court has power to stay the earlier judgment or execution until the later is obtained, in order that set-off may be effected.

> *Adams* v. *Manning*, 17 Mass. 178, 180 (1821).

Thus, plainly, the holder of a cross-claim who is sued by a resident of Massachusetts in the courts of the Commonwealth will always be able by cross-action to obtain judgment on his claim and set off the execution against that obtained by the resident.

Counterclaim by Cross-Action. (b) Non-Residents. With regard to non-resident persons generally, the non-personal service authorized by General Laws, chapter 223, section 31, and General Laws, chapter 227, section 7, would of course be ineffective for want of jurisdiction.

> *Pennoyer* v. *Neff*, 95 U.S. 714 (1877).
> General Laws, c. 227, §1.

However, the completeness of the Massachusetts system of counterclaim requires a statute subjecting non-residents to cross-actions brought by defendants whom they have sued. Such a statute was enacted in 1823 (Acts of 1823, c. 118), now General Laws, chapter 227, sections 2 to 4, the sections in question in this case. They provide (§2) that where an action is brought by a non-resident he shall be liable to cross-actions brought by the person sued. The statute then provides (§3) for service of process upon the non-resident's attorney of record—a device calculated to give to the non-resident prompt and expert notice of the bringing of the cross-action. It is then provided (§4) that the executions in the cross-actions may be set off against each other, and that, if one party threatens to obtain an execution before the action of the other party has arrived at final judgment, execution may be stayed to permit effective set-off. The essential nature of this statute as part of counterclaim procedure is indicated by two provisions: (*a*) Under section 2 only such cross-actions can be brought as will result in executions which can be set off against each other. (*b*) Under section 4 the execution in either suit may be stayed pending the obtaining of an execution in the other suit. Plainly, the purpose of the cross-actions is to give the right of counterclaim, and the method of obtaining execution is adapted to counterclaim functions.

In any system of counterclaim procedure the essential requirement is that that party alone shall receive payment who, on a taking of mutual accounts, is the creditor. The essential injustice to be avoided by any such system is the possibility that that party may obtain a payment who, on a taking of mutual accounts, is really the debtor. To obtain this result and prevent this injustice it is only essential that the *final payment* be so regulated that it shall be received only by the party entitled to a balance. It is quite immaterial whether the cross-claims are prosecuted under a single

docket number or under separate docket numbers, under a single set of pleadings or two sets, even in one court rather than in two courts, provided that the net result is a single payment in favor of him who is the substantial creditor.

The orthodox counterclaim system joins the two claims *ab initio*. This has its inconveniences. Both claims may be exceedingly complex and quite distinct; if they are part of the same suit, all issues must be tried together, with resultant possibility of confusion to the jury. In the event of appellate proceedings as to one claim, difficulties of separation and possibilities of unnecessarily large records are inherent. And there are others. Taking all things into consideration, the Massachusetts legislature has found it more convenient to link the cross-claims only at the point of execution and to treat them as independent up to that point. Where, as here, the trial together of the two claims is convenient, the cases are consolidated for trial. The states whose statutes are listed on page 9, *supra*, have seen fit to follow the example of Massachusetts at least with reference to non-residents.

The Ohio statute, treated in *Higgins* v. *McCrea*, 116 U.S. 671, is a compromise between the orthodox counterclaim system and the Massachusetts system. It requires the counterclaim to be commenced in the same action with the original suit, but then permits separation of the claims into two suits on the motion of either party. Perhaps the Ohio statute is the missing link which indicates the substantial connection between orthodox counterclaim statutes and the Massachusetts statutes here considered.

It may be noteworthy that in the Index to the Massachusetts General Laws, officially prepared (see "Foreword" to Index Volume and Mass. Acts of 1922, c. 197), the statutes here in question are indexed under "Set-Off." In Rhode Island the identical statute is juxtaposed in the same chapter to the section on set-off.

General Laws, Rhode Island, §§4927-4929.

The identical Maine statute has been recognized to be part of the law of set-off and counterclaim—

New Haven Copper Co. v. *Brown*, 46 Me. 418 (1859)—

and has been so declared by the very Circuit Court of Appeals from whose contrary opinion on the Massachusetts statute this appeal is taken.

Champlin Refining Co. v. *Gasoline Products Co.*, 29 F. (2d) 331, 338 (1928).

With these considerations in view, the language of Judge Francis Lowell in 1904 seems clearly justified:

> "The intent of the statute was discussed in *Aldrich* v. *Blatchford*, 175 Mass. 369, in which case the Supreme Court of Massachusetts held it constitutional. The decision was rested upon two grounds: . . . Second. The statute is an extension of the right of set-off. This appears plainly both from the language and history of the law. See St. Mass. 1823, c. 118; Report of the Commissioners on the General Statutes of the Commonwealth (1832), Part 3, Page 82. In matters of set-off the Federal courts follow the laws of the state, provided the distinction between law and equity is not lost sight of. . . . If the statute be treated as an enlargement of the right of set-off, the method of service provided is unobjectionable."

Arkwright Mills v. *Aultman & Taylor Machinery Co.*, 128 Fed. 195, 196 (1904).

Consider for a moment the result of the Circuit Court of Appeals' ruling that these statutes are inapplicable in the District Court in Massachusetts. Preservation and exten-

sion of the right of set-off and counterclaim has always been the especial solicitude of Federal courts.

> "It would be a most pernicious doctrine to allow a citizen of a distant State to institute in these courts a suit against a citizen of the State where the court is held and escape the liability which the laws of the State have attached to all plaintiffs of allowing just and legal set-offs and counterclaims to be interposed and tried in the same suit and in the same forum."
>
> *Partridge* v. *The Insurance Company*, 15 Wall. 573, 580 (1872).
>
> *Chicago & N.W. Ry.* v. *Lindell*, 281 U.S. 14, 17 (1930).

> "Recognition is just beginning to be given to the fact that the right [i.e. of counterclaim] as between litigants is something more than a procedural convenience and is really a requirement of substantial justice . . . a modern court should strive to do complete justice; a partial and incomplete adjudication tends only to protract and complicate litigation to the detriment of all concerned."
>
> Per Mack, J., in *The Gloria*, 286 Fed. 188, 192 (1923).

> "The right [of counterclaim] . . . being found conducive to the administration of justice, has been greatly extended by legislative enactments and a liberal construction by the courts . . . by the exercise of this equitable jurisdiction the courts are enabled to do justice between the parties in cases not strictly within the provisions of the statute."
>
> Per Anderson, J., in *Champlin Refining Company* v. *Gasoline Products Company*, 29 F. (2d) 331, 338 (1st C.C.A. 1928).

Yet if the Circuit Court of Appeals is right, the District Court for the District of Massachusetts is administering a procedure of set-off and counterclaim that has made no advance since the antique statutes permitting set-off of liquidated claims were first enacted. More particularly with reference to this case, the District Court is administering a system which prevents simultaneous litigation, in the same court, of claims arising out of the same transaction, and permits, as here, a non-resident entitled to $100 on his claim to obtain an enforceable execution against a resident who on a mutual accounting is the creditor in the net amount of over $10,000. And this while the State courts of concurrent jurisdiction are administering a thoroughly liberalized modern counterclaim procedure.

Worse still: If the Circuit Court of Appeals is right, the effectiveness of this statute in the State courts of Massachusetts is destroyed wherever the amount in controversy is or can be made to seem $3000. For, assured of protection against cross-claims in the Federal courts, no non-resident will henceforth resort to the State courts for relief. The resulting increase in diversity-of-citizenship cases in the District Courts might be substantial.

IV.

The Application of General Laws, Chapter 227, Sections 2 to 4, in the District Court does Not Improperly Enlarge the Jurisdiction of the Federal Courts.

The majority opinion in the Circuit Court of Appeals rules that these statutes in permitting suit against a non-resident plaintiff to be based upon service of process upon his attorney of record "would enlarge the jurisdiction of the Federal court in the District of Massachusetts as to suits brought against the non-resident by doing away with the requirement of personal service of process and substituting in its place the constructive service provided for

in the State statute" (R. 109). The court arrives at this conclusion on the authority chiefly of *Mexican Central R.R.* v. *Pinckney,* 149 U.S. 194 (1893), *Southern Pacific Co.* v. *Denton,* 146 U.S. 202 (1892), and *Goldey* v. *Morning News,* 156 U.S. 518 (1895) (R. 102). We now proceed to analyze this theory.

First, what is the jurisdiction of the District Court for the District of Massachusetts which, as is alleged, has been "enlarged"? The Acts of Congress dealing with this question are only three: Section 24 of the Judicial Code (U.S. Code, title 28, sec. 41) requires that the suit be between citizens of different states, and that the matter in controversy exceed $3000, exclusive of interest and costs. Section 51 of the Judicial Code (U.S. Code, title 28, sec. 112) provides that "where the jurisdiction is founded only on the fact that the action is between citizens of different states, suits shall be brought only in the district of the residence of either the plaintiff or the defendant." With regard to service of process, Revised Statutes, section 787 (U.S. Code, title 28, sec. 503), gives authority to marshals to make service "throughout the district" in which they were appointed.

No one contends that any one of these statutory provisions is violated by the proposed application of General Laws, chapter 227, sections 2 to 4, in this case. The suit is between citizens of different states. It does involve more than $3000. It is brought in the district where the plaintiff resides. And in making service upon the attorney of record for McNeal-Edwards Company the United States marshal did not have to go out of his district.

Where, then, the "enlargement" of Federal jurisdiction? Says the court (R. 109): "by doing away with the requirement of personal service of process and substituting in its place the constructive service provided for in the state statute." Yet *every* State statute providing for service of process "enlarges" Federal jurisdiction in precisely the same way. There is no Federal statute prescribing the method

of service of process. That is left entirely to state practice under the Conformity Act.

Amy v. *Watertown*, 130 U.S. 301 (1889).

Thus the Massachusetts statute providing for service of process by delivering a copy of the process in hand to the defendant within the Commonwealth (General Laws, c. 223, sec. 29) "enlarges" the jurisdiction of the District Court for the District of Massachusetts beyond what it would be in the absence of that statute. No greater "enlargement" is involved in General Laws, chapter 227, section 3, the statute here under consideration. The "enlargement" is in a different direction; but, provided the statute is constitutional, this is immaterial.

Of course there is a certain field for discretion in the Federal courts implied in the "as near as may be" clause of the Conformity Act. This has been interpreted as permitting the Federal courts to disregard "state statutes which, in their judgment, would unwisely encumber the administration of the law, or tend to defeat the ends of justice."

Indianapolis & St. Louis R.R. Co. v. *Horst*, 93 U.S. 291-301 (1876).

Enough has already been said as to the position of this statute in the Massachusetts procedural system to indicate that these sections cannot be brought within this classic definition. If we are right about this, there remain only two alternatives: (1) to declare that this statute represents an unconstitutional attempt on the part of the Commonwealth of Massachusetts to exercise jurisdiction over persons who are not subject to its power, or (2) to apply the constitutional Massachusetts statute with reference to service of process in the Federal courts in the District of Massachusetts. The constitutional aspects of the problem have already been argued. It is submitted that the second

alternative is alone open, and that the statute could be applied.

Analysis of Authorities Cited by Court Below. The Circuit Court of Appeals mustered an imposing array of authority to support its view. The great reliance placed by Bingham, J., upon these cases justifies a more detailed analysis than would otherwise be appropriate. The cases will be considered *seriatim* as discussed in the Lower Court opinion.

SOUTHERN PACIFIC COMPANY *v.* DENTON, 146 U.S. 202 (1892)
and
MEXICAN CENTRAL RAILROAD *v.* PINCKNEY, 149 U.S. 194 (1893)
(R. 103-104).

These two cases involved substantially the same question and may be treated together. The question concerned the applicability in the Federal courts sitting in Texas of a Texas statute providing that an appearance on behalf of a defendant, although in terms limited to the purpose of objecting to the jurisdiction of the court, should constitute a general appearance and a waiver of immunity from jurisdiction. This statute as applied in State courts had already been held constitutional in *York* v. *Texas*, 137 U.S. 15 (1890), which decision was later reaffirmed with reference to a Kentucky statute in *Western Indemnity Company* v. *Rupp*, 235 U.S. 261 (1914).

In the *Denton* case the Court pointed out (p. 209) that conformity to state practice was required only "as near as may be," and therefore that this statute would not be applied in the Federal courts because manifestly unfair and obstructive of the administration of justice. In the *Pinckney* case the same reasoning was relied upon (p. 207), but the Court further pointed out (p. 208) that the Texas statute if applied in the United States District Courts, would defeat the operation of Acts of Congress which confer upon litigants in the Federal courts the right to have the juris-

diction of such courts reviewed by the Supreme Court of the United States.

The state statute under consideration in the *Denton* and *Pinckney* cases, if enforced in the Federal courts, would have released all restrictions on the jurisdiction of those courts. It provided that the mere action of a litigant in raising a jurisdictional question constituted a submission by that litigant to the jurisdiction of the court and a waiver of any right to obtain review of jurisdictional issues in the Supreme Court of the United States. The essence of Federal jurisdiction is its limited character—limited as to subject-matter, as to parties, and as to venue. The Texas statute, if applied, would have resulted in the complete abolishment of those limitations. Thus, in the *Denton* case, if the statute had been applied, an action based upon diversity of citizenship could have been brought in a district where neither plaintiff nor defendant resided and the defendant would have had no method of objecting to this violation of Judicial Code, section 51.

The differences between the Texas statute under consideration in the *Denton* and *Pinckney* cases and the Massachusetts statute now before the court are too obvious for mention. It has already been pointed out that enforcement of this statute involves no violation of the statutory or constitutional restrictions on Federal jurisdiction.

DAVIDSON MARBLE CO. *v.* GIBSON, 213 U.S. 10 (1909) (R. 107).

In this case a rule of the Circuit Court for the Northern District of California sought to perform substantially the function of the Texas statute in the *Denton* and *Pinckney* cases. It provided that where a special appearance was entered in support of a jurisdictional objection, the overruling of the jurisdictional objection would automatically turn the special appearance into a general appearance. The result plainly was to render all jurisdictional questions non-

appealable. Of course this Court decided that such a rule of court was invalid as being inconsistent with the Acts of Congress providing for appeal of jurisdictional questions to this Court.

The case is plainly of the same cloth with the *Denton* and *Pinckney* cases. It indicates that the courts will not permit the restrictions on Federal jurisdiction to be removed whether by state statute or by Federal court rule. It has already been pointed out that General Laws, chapter 227, sections 2 to 4, in no wise relaxes the limitations on Federal jurisdiction. *Davidson Marble Co.* v. *Gibson* plainly has nothing to do with the Conformity Act or the application of state practice to the Federal courts.

MECHANICAL APPLIANCE CO. *v.* CASTLEMAN, 215 U.S. 437 (1910) (R. 105-106).

This is another case of the *Denton* and *Pinckney* type. By the state practice the sheriff's return on process was conclusive. It was held that this practice could not be applied in the Federal courts since the conclusiveness of the sheriff's return might cause the Federal courts to exercise a jurisdiction beyond the statutory limits. Here again was the case of a state practice which *prevented the adjudication* of jurisdictional questions. It is totally unlike the Massachusetts statute now before the Court.

GOLDEY *v.* MORNING NEWS, 156 U.S. 518 (1884) (R. 104-105).

In this case it was necessary to decide whether the Federal courts sitting in New York could exercise jurisdiction over a foreign corporation not doing business in the state on the sole basis of service of process upon an agent casually within the state. At that time the New York courts claimed the right to exercise such jurisdiction. It had already been decided that judgments based upon the exercise of such

jurisdiction by the New York courts would not be given full faith and credit in other states.

Lafayette Insurance Co. v. *French*, 18 How. 404 (1855).

As soon as the question arose it was decided that the mere rendition of such judgments was an unconstitutional exercise of power by the State of New York.

Riverside Mills v. *Menefee*, 237 U.S. 189 (1914).

So of course this Court held that the Federal courts sitting in New York could not properly render judgment against a foreign corporation based upon such service of process.

The case holds no more than that a Federal court cannot apply a state practice which would result in a judgment not entitled to full faith and credit in any other court and itself violative of the due-process clause—in a word, that a Federal District Court cannot apply unconstitutional state statutes.

But something must be said as to the reasoning of the Circuit Court of Appeals based upon the *Goldey* case, and certain others. This Court said in the *Goldey* case that jurisdiction cannot be obtained over a non-resident "except by actual service of notice within the jurisdiction upon him or upon some one authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service." The majority opinion in the court below quotes this language (R. 104), and cites (R. 101) the familiar cases holding that a foreign corporation is not "present" within the jurisdiction, so that a personal judgment may be obtained against it, unless it does business within the state.

At this date the cases cited by Bingham, J., are scarcely news, but the conclusion drawn from them suggests novelty. In these cases this Court had to consider whether the fact

that a foreign corporation's agent was within a state placed the corporation in that state for purposes of suit. It has always been held that the presence of an agent within the jurisdiction does not afford a sufficient basis of power for a judgment against the foreign corporation; that a foreign corporation is only "present" where it does business. Of course in these cases the Court did not have before it the question whether there were *other* bases of jurisdiction over a foreign corporation—and particularly the question as to the existence and scope of jurisdiction over a foreign corporation resulting from its invocation of the jurisdiction of a sovereign. Yet from these decisions the Circuit Court of Appeals draws the conclusion that in no event can a judgment be rendered against a foreign corporation not doing business within the state unless it has appeared generally —and, more specifically, that General Laws, chapter 227, sections 2 to 4, are unconstitutional and inapplicable in the Federal courts.

One difficulty with this conclusion of Bingham, J., is that it proves too much. Consider that most ancient and conservative type of statute which permits set-off of liquidated claims with right of affirmative judgment against the plaintiff. If the Circuit Court of Appeals is right in its belief that doing business in the state is the only basis of jurisdiction over a foreign corporation, a State court could not render an affirmative judgment against a plaintiff foreign corporation under such a set-off statute. The opinion of Bingham, J., disregards the fact that the bringing of suit by a foreign corporation may properly and constitutionally afford the basis of jurisdiction for cross-claims against the plaintiff foreign corporation (see pp. 9-13 of this brief) and that this jurisdiction is entirely distinct from a jurisdiction predicated upon the corporation doing business within the state. A time-worn caution may here be usefully repeated:

"Every opinion must be read in the light of the facts there presented. Statements of rules as applicable to that case cannot be taken out of their context and stretched to different circumstances not before the mind of the court."

Swan v. *Justices of the Superior Court*, 222 Mass. 542, 545 (1916).

An interesting commentary on the analysis of decisions of this Court by the Circuit Court of Appeals is afforded by the statement that *York* v. *Texas* was overruled by *Riverside Mills* v. *Menefee* (R. 109). This statement is particularly challenging in view of the fact that in *Western Indemnity Co.* v. *Rupp*, 235 U.S. 261 (1914), the same judges that decided the *Menefee* case reaffirmed *York* v. *Texas* at the same term of court. If the Circuit Court of Appeals is right, this Court has overruled itself *sub silentio* at the same term, each decision being rendered by a unanimous court, and subsequent reaffirmance and explanation of *York* v. *Texas* in *Chicago Life Ins. Co.* v. *Cherry*, 244 U.S. 25 (1917), is meaningless. This is striking enough; but it is no less striking to find the Circuit Court of Appeals declaring (R. 109) that the decision in *Riverside Mills* v. *Menefee* also holds unconstitutional the Massachusetts statute now before the Court. The state practice involved in the *Menefee* case is wholly unrelated to the instant problem.

For a general criticism of the holding of the Circuit Court of Appeals in this case and further discussion as to the inadvisability of the result see *Federal Jurisdiction of Foreign Corporations as Limited by Doctrinal Immunity of Federal Jurisdiction to Modification by State Statute*, 40 Yale Law Journal, 441-448 (January, 1931).

V.

Conclusion.

We believe that the Conformity Act requires the application of this Massachusetts statute in the District Court for the District of Massachusetts, and that no decision of this Court or Act of Congress requires the contrary result. Still more surely are we convinced that the common sense of the situation requires the application of this statute. It is hardly believable that in the year 1931 in the national courts of this country it is necessary to litigate for nearly ten years, and to carry to the highest court in the land, the question whether one party to a transaction against whom suit is brought can prosecute a cross-claim arising out of the same transaction to an affirmative judgment. It is unthinkable that the ultimate decision of the Federal courts on this question should be in the negative. Elementary justice to the cross-claimant and ordinary efficiency of judicial administration demand that this type of proceeding receive the sanction of this Court.

SECOND QUESTION: CONSTRUCTION OF THE MASSACHUSETTS STATUTE.

STATEMENT OF THE CASE RELATING TO SECOND QUESTION.

Three actions arose out of the fish-oil contract in question.

The first action (District Court docket No. 2054) was commenced on September 15, 1922, in the Superior Court for Suffolk County, Massachusetts, by Frank L. Young Company, a Massachusetts corporation, by attachment of the oil drums of McNeal-Edwards Company, a Virginia corporation. The declaration alleged breach of warranty as to the oil. Counsel appeared specially on behalf of the McNeal-Edwards Company, removed the case to the United States District Court for the District of Massachusetts, and

there filed an answer (R. 73). Because of the limitation of recovery to the value of the attached property, a discontinuance was filed therein on February 28, 1927. The docket entries in this first case are set forth at R. 73.

The second action (District Court docket No. 2071) was commenced in the United States District Court by McNeal-Edwards Company, alleging failure to return the drums within a reasonable time. Personal jurisdiction over Frank L. Young Company was, of course, obtained. Asa P. French was attorney of record for the plaintiff. This action was tried with the case at bar, and resulted in a judgment for the respondent for one hundred dollars' damage. Docket entries in this suit are set forth at R. 74 to 75.

While the second action was pending, Frank L. Young Company commenced the present action (District Court docket No. 3021) and caused service to be made on the respondent by serving Asa P. French "as said French is attorney of record" of the respondent (R. 4) in compliance with the provisions of the statutes above set forth (*supra*, pp. 3-4). The writ in this third action was dated January 4, 1927, and was duly entered March 22, 1927. Docket entries in this suit are set forth at R. 75 to 77.

The plea in abatement and motion to dismiss of McNeal-Edwards Company in the present action were overruled and denied (R. 6, 9, 82).

SUMMARY OF ARGUMENT ON SECOND QUESTION.

For convenience the essential language of the statute is again quoted (full text at pp. 3-4, *supra*):

> "SECTION 2: If an action is brought by a person not an inhabitant of the commonwealth . . . he shall be held to answer to any action brought against him here by the defendant in the former action, if the demands are of such a nature that the judgment or execution in

the one case may be set off against the judgment or execution in the other . . .

"Section 3: The writ in such cross-action may be served on the attorney of record for the plaintiff in the original action."

The contention of counsel for McNeal-Edwards Company may be briefly stated. There is no contention that the present case does not come within the language of section 2, taken of itself. It is urged, however, that section 3 limits the scope of section 2; by referring to the non-resident's action as the "original action," it requires that this be the first action between these parties; by referring to the defendant's action as a "cross-action," it requires that this be the second action between these parties. Applied to the present case, the argument is that since Frank L. Young Company itself brought, and then discontinued, the first action in this series of lawsuits, the action of McNeal-Edwards Company is not an "original action," the present action is not a "cross-action," and therefore the statute does not apply. We proceed to consider this contention.

These sections are remedial legislation and are therefore entitled to a broad and liberal construction with a view to fulfilling their obvious purpose. This principle is peculiarly applicable to a law relating to set-off and counterclaim, which is "something more than a procedural convenience and is really a requirement of substantial justice."

The obvious purpose of this statute is to prevent the essential injustice inherent in a non-resident coming within the jurisdiction, invoking the power of its courts and yet withholding itself beyond the power of the court with reference to claims against it held by the person sued. Precisely this injustice will occur here unless the statute is held applicable. McNeal-Edwards Company has brought a suit in the District Court for the District of Massachusetts, has obtained personal jurisdiction over Frank L. Young Com-

pany, and has been awarded judgment for $100. The jury's verdict indicates that it nevertheless owed in the same transaction $10,700. If the statute is not applied to this case, McNeal-Edwards Company, the substantial debtor to the extent of $10,600, will, as the ultimate result of the litigation, receive payment of $100 plus the costs of two suits. No clearer violation of the policy behind General Laws, chapter 227, sections 2 to 4, could be imagined.

This case is within the letter of the Massachusetts statute no less plainly than its spirit. There is no contention that this action does not fall within the language of section 2, taken alone. Does section 3 limit section 2? We submit that it does not. The word "cross-action" in section 3 is only a word of reference to the action brought *against* the nonresident defined in section 2. The word "original action" is only a word of reference to the action brought *by* the nonresident defined in section 2. These words of reference should be given no more significance than if the words "latter action" and "former action" had been used. No limiting intent is apparent on the face of section 3. Moreover the words "original action" and "cross-action" are words of relationship; in a series of lawsuits the fifth is as much a "cross-action" to the fourth as is the second to the first. The limiting construction contended for by the respondent imputes to the Massachusetts legislature an intent to remedy less than the whole injustice at which the statute was aimed.

ARGUMENT ON SECOND QUESTION.

I.

This Statute, being Remedial, must be Liberally Construed to Accomplish its Obvious Purpose.

This Court and others have given consistent recognition to the canon of statutory construction that remedial statutes are to be liberally construed and that the strict letter

of the act must yield, if necessary, to its evident spirit and purpose.

Fleischman Co. v. *United States,* 270 U.S. 349, 360 (1926).
Holy Trinity Church v. *United States,* 143 U.S. 457, 463 (1892).
Camunas v. *New York &c. Co.,* 260 Fed. 40, 52 (1919, 1st C.C.A.).
Interstate Drainage &c. Co. v. *Board of Commissioners,* 158 Fed. 270, 273 (1907, 8th C. C.A.).

The Court will "look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning that the purpose may not fail."

Ozawa v. *United States,* 260 U.S. 178, 194 (1922).

Particularly has this principle been applied to statutes such as that before the Court, which provide for set-off and counterclaim.

Champlin Refining Co. v. *Gasoline Products Co.,* 29 F. (2d) 331, 338 (1928).
Perry v. *Pye,* 215 Mass. 403, 414 (1913).
Galligan v. *Fannan,* 9 Allen, 192 (1864).
Sargent v. *Southgate,* 5 Pick. 312, 316 (1827).
Stewart v. *Knight,* 83 Vt. 201, 203 (1910).
Seibert v. *Dunn,* 210 N.Y. 237, 245 (1915).
Imbriglio v. *Gazzero,* 43 R.I. 83 (1920).

A reference to the history of the Massachusetts statute, the language of which has undergone little change since its original enactment in 1823, shows that it was regarded as a part of the law of set-off by the Commissioners on the

Revision of Statutes in 1834 and retained by them as such. Its place in the modern Massachusetts law of set-off has already been indicated at pages 17 to 21 of this brief. Its validity as part of the law of set-off was upheld by the Supreme Judicial Court of Massachusetts in *Aldrich* v. *E. W. Blatchford & Co.*, 175 Mass. 369 (1900), *supra*, and it is as such that the statute was held applicable to the Federal courts in *Arkwright Mills* v. *Aultman & Taylor Co.*, 128 Fed. 196; S.C., appealed on merits, 145 Fed. 783 (1906).

The purpose this statute serves and the abuse it seeks to correct are apparent. The legislature has considered it fundamentally unjust that a non-resident should be able to bring suit, obtain personal jurisdiction over and an enforceable judgment against a resident, and yet withhold himself beyond the reach of process in other actions. Particularly is this injustice apparent where, as here, the other action arises out of the same contract. The non-resident is under no compulsion to bring suit and invoke the jurisdiction of the local courts; but through this statute the legislature declares that, if he does so, he must submit to a general accounting between himself and the resident, and permit the court to render an enforceable judgment for the substantial creditor between them.

II.

The Present Case is within the Letter and Spirit of the Statute.

In this case McNeal-Edwards Company, a non-resident, was sued by the Young Company in an action in which jurisdiction was limited to the value of attached drums. McNeal-Edwards Company could, had it so chosen, have defended its interest in the drums without submitting personally to the jurisdiction of the District Court. *Cheshire National Bank* v. *Jaynes*, 224 Mass. 14 (1916). But it was not content to defend; it wished to attack. It therefore brought an action in the District Court against the Young Company

for damages for the latter's failure to return the drums. It thus obtained personal jurisdiction which could form the basis of a personal judgment. *And such judgment has actually been obtained.* McNeal-Edwards Company now insists that it is nevertheless not amenable personally to the jurisdiction of the court in which it brought its own action. It seeks to hold Frank L. Young Company personally, and yet to withhold itself personally from the court's jurisdiction. If there are considerations of elemental fairness behind the statute, there can be no question that McNeal-Edwards Company seeks to violate them. No set of facts could bring a case more clearly within the spirit of the statute.

The case is not less within the letter of the statute. The act requires (*a*) that an action be brought by a person not an inhabitant of the Commonwealth—McNeal-Edwards Company is such a person; (*b*) that the person cannot be found within the jurisdiction to be served with process—McNeal-Edwards Company could not be so found; (*c*) that the demands be of such a nature that executions may be set off against each other—they are of such a nature; (*d*) that service be made upon the attorney of record—it was so made.

In the courts below it was repeatedly argued that the statute applies only to "cross-actions" against non-residents, that the suit brought by McNeal-Edwards Company was itself a "cross-action," and therefore could not be an "original action" within the language of the statute, to which a "cross-action" could be brought.* Unembarrassed by detailed reference to the statute, this suggestion has some appearance of plausibility. For present purposes the essential words of the statute are the following:

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*Of course the fact that the writ in the present action of Frank L. Young Company was dated before the former action was discontinued is immaterial, since the discontinuance was filed before this action was entered or any plea in abatement filed. *Manufacturers Bottle Co.* v. *Taylor-Stites Glass Co.*, 208 Mass. 593 (1911); *Spear* v. *Coggan*, 223 Mass. 156, 157 (1916).

"If an *action* is brought by a person not an inhabitant . . . he shall be held to answer to *any action* brought against him here by the defendant in the *former action*. . . . If there are several defendants *in the original action*, each of them may bring such *cross-action*. . . . The writ in *such cross-action* may be served on the attorney of record."

It seems clear that the first sentence of the statute establishes the substantive rights of litigants. There is no question that McNeal-Edwards Company brought "an action" and that the present suit is "any action" brought by the "defendant in the former action." It has never been doubted that, if the first sentence of the statute stood alone, McNeal-Edwards Company would be within its provisions. However, it is contended that the meaning of this sentence is narrowed by the second and third sentences, the argument being that, by referring to "an action brought by a person not an inhabitant" as "the original action" and by referring to the action brought in pursuance of these sections as a "cross-action," the legislature established statuses of "original actions" and "cross-actions"; that McNeal-Edwards Company was plaintiff only in a "cross-action"; and therefore that the statute could never apply to it.

Several remarks may be made about such an argument.

(*a*) Clearly the words "original action" and "cross-action" are used merely as shorthand expressions to refer back to the suits already described in the broadest possible terms in the first sentence of the statute. There is no indication that the legislature intended by these reference words to limit the generality of the foregoing operative language.

(*b*) Even if the words "original action" and "cross-action" had been used in a limiting sense or had appeared in the first sentence, they would not restrict the rights of the Frank L. Young Company. These are terms which express

not an absolute status, but a relation to some other action. Thus it is quite proper to state that the suit of *McNeal-Edwards Company* v. *Frank L. Young Company* was a "cross-action" as to the first suit of *Frank L. Young Company* v. *McNeal-Edwards Company*. But it is equally true that the second suit of *Frank L. Young Company* v. *McNeal-Edwards Company* is a "cross-action" as to the suit of *McNeal-Edwards Company* v. *Frank L. Young Company*. Suppose, for example, that the present contract had called for deliveries by instalments, that the Young Company had sued McNeal-Edwards Company for breach of warranty in the first instalment and that McNeal-Edwards Company had then sued the Young Company for the price of the second instalment; would it be contended that, if the Young Company brought suit for breach of warranty in the second instalment, that was not a cross-action as regards the McNeal-Edwards Company suit? The terms used in the statute express relationship to prior litigation. In a series of suits the fifth is as much a cross-action to the fourth as the second is to the first. The temper of the Massachusetts courts toward such a question is indicated by the closely analogous holding that where A has sued B, and B has filed a declaration in set-off, A may file a declaration in set-off to B's set-off.

Galligan v. *Fannan*, 9 Allen, 192 (1864).

(*c*) Finally, such an argument as is made for McNeal-Edwards Company assumes that the legislature intended to correct less than the whole abuse at which its enactment aimed. The Young Company is a resident against whom a non-resident has obtained personal judgment by a suit in this jurisdiction. Unless service can be made and jurisdiction obtained under these statutes, the Young Company will be unable to try out both sides of the dispute on this contract. This is precisely the situation the statute was in-

tended to remedy. Certainly an intention of the legislature to accomplish less than its whole purpose will not be imputed without clear words.

It may not be inappropriate at this point to quote from the opinion of Circuit Judge Mack in *The Gloria*, 286 Fed. 188, 192 (1923), *supra*, cited by the court below with approval in *Champlin Refining Co.* v. *Gasoline Products Co.*, *supra*. The United States moved to dismiss certain cross-libels filed against it, claiming the immunity of a sovereign from suits in its own courts. Denying the motions, the judge said:

> "Recognition is just beginning to be given to the fact that the right (*i.e.*, of counterclaim) as between litigants is something more than a procedural convenience and is really a requirement of substantial justice. . . . *A modern court should strive to do complete justice; a partial and incomplete adjudication tends only to protract and complicate litigation to the detriment of all concerned.*"

THIRD QUESTION: PETITIONER'S RIGHT TO RECOVER AS A MATTER OF CONTRACT LAW.

STATEMENT OF THE CASE RELATING TO THIRD QUESTION.

In January, 1922, Frank L. Young Company contracted to buy from McNeal-Edwards Company 1000 to 1200 barrels of "Prime A Crude Menhaden Fish Oil," at 33 cents per gallon, in seller's drums, delivered in Baltimore, "Drums to be returned to sellers, freight prepaid." This contract was contained in a purchase order and broker's note (R. 18-19). Reilly-Edwards Company were the brokers, to whom, by custom of the trade, orders were addressed and by whom orders were accepted on behalf of the seller (R. 28).

The lot of oil comprised 1107 barrels (R. 24). It was shipped from Baltimore, arrived at the Young Company's plant in Boston in January or February (R. 28), and was duly paid for (R. 29). Prime A Crude Menhaden Fish Oil at 60 degrees, Fahrenheit, contains 8 to 15 per cent of "foots," that is, of whitish solids (R. 20). The oil shipped by McNeal-Edwards Company contained 80 per cent of foots (R. 22-23). This high percentage of solids rendered it impossible to dump the oil from the drums in cold weather, and very difficult even in July and August. It was finally dumped in July and August (R. 22, 80-81). Due to the high percentage of solids, the oil delivered was not Prime A oil (R. 28, 35), and its value was only 17 cents per gallon (R. 36) as against a contract price of 33 cents.

Frank L. Young Company complained as to the quality of the oil at once (R. 29), and the controversy with reference thereto lasted several months (R. 30). McNeal-Edwards Company demanded return of the drums. It was pointed out by the Young Company that the drums could not be returned until empty and that excessive viscosity prevented pouring until mid-summer; moreover, that the Young Company desired McNeal-Edwards Company to inspect this oil in the original containers (R. 80-81). Obtaining no satisfaction from McNeal-Edwards Company regarding the quality of the oil, Frank L. Young Company brought suit and attached the drums on September 15, 1922 (R. 69).

For a more complete statement the charge of Judge Morton in the District Court cannot be improved upon (R. 59-70).

The jury found the oil defective, and awarded damages of $10,730.17 to Frank L. Young Company (R. 71). In the companion case, brought by McNeal-Edwards Company, the jury found that Frank L. Young Company had retained the drums beyond a reasonable time, and awarded $100 damages to McNeal-Edwards Company (R. 71).

SUMMARY OF ARGUMENT ON THIRD QUESTION.

Respondent's contention is that Frank L. Young Company is incapacitated from recovering its damages of $10,730.17, suffered by reason of defective quality of the oil, because it caused $100 damage to respondent by retaining an unreasonably long time the drums in which the oil had been shipped. This contention was upheld by the original opinion of the Circuit Court of Appeals (R. 86), now superseded (R. 92).

At the outset there should be noted certain qualities of the breach of contract by Frank L. Young Company which is alleged to disqualify it from recovering. *The breach concerns a collateral and ancillary provision of the contract* not going to the heart of the consideration. This was a contract for the purchase and sale of fish oil, not a transaction in second-hand containers. The essential obligation of McNeal-Edwards Company was to deliver oil of a specified quality; the essential obligation of Frank L. Young Company to pay unwards of $18,000. This obligation the Young Company performed. Its breach concerns only the separable and wholly incidental obligation to return the used containers. *The Young Company's breach occurred subsequent to the breach of McNeal-Edwards Company,* and from the nature of the contract a breach by the buyer in failing to return the drums on time must have occurred subsequent to a breach by the seller through delivering defective oil. *The Young Company's breach was trifling* with relation both to the size of the transaction and to the extent of the breach of McNeal-Edwards Company.

For two procedural reasons no defense based upon petitioner's breach is raised on the record:

(A) No defense based upon the Young Company's breach was raised by the pleading. Upon delivery of defective oil the Young Company had a matured cause of action, upon which it could immediately have brought suit. Any subse-

quent matter, including a subsequent breach of contract, alleged to destroy this cause of action, had to be pleaded as an affirmative defense. The elaborate answer filed by McNeal-Edwards Company contained no defense based upon breach of contract by Frank L. Young Company.

(B) Assuming such a defense to be in issue under proper pleadings, it was not properly raised at the trial. The errors of the District Court assigned by respondent (Nos. 4, 7, and 8, R. 83-84) consist in the denial of requests for instructions to the jury that the Young Company could not recover because of its failure to return the drums. Under Rule 44 of the Massachusetts Superior Court, adopted for the District Court for the District of Massachusetts by its Rule 35, this question could be raised only by motion for directed verdict, and not by requests for instructions. A motion for directed verdict was filed, but was never presented to the court; no ruling was made or requested thereon and no exception taken to any ruling or failure to rule. Under unequivocal decisions of the Massachusetts courts construing Rule 44 the district judge was compelled to deny the requests for instructions upon which alone the respondent relies and can rely.

Assuming the issue to have been properly pleaded, and further assuming that the question could have been raised by requests for instructions, the requests were properly denied as a matter of the law of contracts.

Under *Swift* v. *Tyson* the District Court was bound to apply the general commercial law to the question whether the Young Company's breach rendered it incapable of recovering damages for McNeal-Edwards Company's breach. Under the general commercial law, well established since the leading English case of *Boone* v. *Eyre* and adopted by this Court and the Circuit Courts of Appeals generally, a breach by the plaintiff is available in defense only if it is substantial, goes to the heart of the consideration, and is prior

to or contemporaneous with the defendant's breach. None of these qualities exist in the case at bar. Here the breach is trifling, relates to a collateral and ancillary provision of the contract, and is subsequent by many months to the defendant's breach. It could be and has been amply compensated for in damages.

It is argued that the Young Company's breach was "wilful" and that all wilful breaches—whether or not substantial, whether or not going to the essence of the consideration, and whether prior or subsequent in time—incapacitate a party from recovering. This argument must be subdivided into the contention made *ex proprio motu* by the Circuit Court of Appeals, and the contention advanced by counsel for McNeal-Edwards Company (which has thus far received approval from no judge connected with this case).

The Circuit Court of Appeals in its first opinion ruled that the retention of the drums to September 15 was an intentional breach and precluded Frank L. Young Company from recovery. This thought, as already suggested, was original with the Court. In the first place the record discloses no evidence upon which the jury could find, much less be compelled to find, that the breach was intentional. It was primarily upon this ground that the successful petition for rehearing in the Circuit Court of Appeals was based. Detailed analysis of the record on this point, otherwise unjustified, is included hereafter. In the second place there is no doctrine that an intentional breach by the plaintiff is a bar to recovery where the breach is not substantial and does not go to the heart of the consideration. The intentional nature of the breach may affect its substantiality; thus, in a contract for personal services, where there is an obligation of fidelity, falsification of accounts may constitute a substantial breach where honest error would be unsubstantial. Such a case was *Sipley* v. *Stickney*, 190 Mass. 43, upon which the Circuit Court of Appeals relied. But in the ordinary commercial transaction, not involving fiduciary or

quasi-fiduciary relationships between the parties, the fact that the breach is wilful rather than negligent is immaterial.

Respondent's counsel contended in the Circuit Court of Appeals, and presumably contends here, that the attachment by Frank L. Young Company, on September 15, 1922, of the drums which it was obligated to return was a wilful breach incapacitating it from recovery. There are three answers to this contention: *First*, the attachment of the drums was no breach at all. All creditors of McNeal-Edwards Company had the statutory right to attach its property within the state. The Young Company in this respect had the rights of any other creditor. *Second*, the fact that the attachment of September 15 was no breach is now *res judicata*. In the companion case of *McNeal-Edwards Company* v. *Frank L. Young Company* the district judge ruled that the attachment on September 15 was no breach, and that McNeal-Edwards Company could recover only for such detention up to September 15 as was unreasonable. This case has now gone to judgment and the determinations therein can no longer be disputed. *Third*, the wilfulness of a breach is immaterial provided the breach is unsubstantial and does not go to the heart of the consideration. This point has been enlarged above with reference to *Sipley* v. *Stickney*.

Finally a decision that, where A and B have contracted, a breach by A to the extent of $100 prevents him from recovering for a breach by B to the extent of $10,700 is revolting to the common sense of lawyers and laymen alike.

ARGUMENT ON THIRD QUESTION.

The original opinion of the Circuit Court of Appeals (R. 86) reversed the judgment of the District Court on the merits and ordered judgment for the defendant on the ground that Frank L. Young Company had broken its contract to the extent of $100 through unreasonable detention

of the drums and was thereby incapacitated from recovering for the breach by McNeal-Edwards Company amounting to $10,730.17. After this opinion was announced a petition for rehearing was granted (R. 92) and a different judgment given (R. 92) upon new grounds stated in the second opinion (R. 92). It seems an open question whether the Circuit Court of Appeals still entertains the views expressed in its original opinion. In any event, counsel for McNeal-Edwards Company still urge their contention on the merits. We therefore brief this question fully.

I.

No Defense Based upon Petitioner's Breach of Contract is Raised upon the Record.

It is later argued that the alleged defense based upon petitioner's breach in retaining the drums beyond a reasonable time is insufficient in law. For the moment we point out that *twice* respondent failed to take the necessary procedural steps to raise the question on the record at all. In the first place it failed to allege petitioner's breach in its answer although such breach was plainly matter of affirmative defense. In the second place it sought to save its rights of appellate review by requests for rulings, rather than motion for directed verdict, as required by the District Court rules.

It is frankly conceded that the second of these procedural objections is largely technical. But the first is not. An elaborate answer by the defendant in the District Court put the plaintiff upon notice of several defenses, but made no mention of alleged breach by the plaintiff. Examination of the testimony will indicate that no emphasis was placed upon such breach at the trial. (The companion case with its trifling consequences was allowed to go substantially by default.) Pleadings have a real function—to inform the parties of the issues to be tried. If these pleadings are held

to raise a defense of the plaintiff's breach, the plaintiff has been substantially prejudiced.

A. Petitioner's Detention of the Drums was Matter of Affirmative Defense Required to be Pleaded in Respondent's Answer. It was Not so Pleaded.

The petitioner's declaration sets forth breaches of warranty in connection with a consummated sale. The attention of the court is respectfully directed to the respondent's answer (R. 12). It consists of four paragraphs, the first of which is a general denial; the second a specific denial that the oil was not as ordered; the third and fourth set up defenses relating to the analysis of the oil and adjustments made on account of excess acids. *There is no suggestion that Frank L. Young Company has committed any breach of contract on its part, or that there has been any failure of consideration for defendant's promise.*

By the Massachusetts Practice Act (General Laws, chapter 231, section 28) a defendant's answer is required to "state clearly and precisely each substantive fact intended to be relied upon in avoidance of the action," and defenses not pleaded are not considered by the courts. This rule has been applied so often in the State courts that a few representative cases only need be cited:

Mark v. *Stuart-Howland Co.*, 226 Mass. 35 (1917) (abandonment of contract).

Grinnell v. *Spink*, 128 Mass. 25 (1879) (accord and satisfaction).

Nowell v. *Equitable Trust Co.*, 249 Mass. 585, 595 (1924) (*ultra vires* contract).

Aisenberg v. *Royal Insurance Co., Ltd.*, 266 Mass. 543 (1929) (statute of limitations).

Indiana Flooring Co. v. *Rudnick*, 236 Mass. 90, 92 (1921) (partial failure of consideration).

Under the Conformity Act this rule was made binding on the District Court, and it has been recognized and held applicable in the Circuit Court of Appeals.

Hallett v. *New England Roller Grate Co.*, 119 Fed. 873 (1903, 1st C.C.A.).

The result is that on these pleadings only those issues were raised which the plaintiff must aver and prove in order to establish a prima-facie case. *Friedenwald & Co.* v. *Warren*, 195 Mass. 432, 434 (1907). This burden is sustained by proving to the satisfaction of the jury that the oil delivered was not of the quality and grade called for by the contract (R. 14).

It was no part of petitioner's case in the District Court to allege and prove performance of the obligation to return the drums within the reasonable time. Where part of the performance of one party to a contract is necessarily later in time than the principal performanee thereunder, such performance cannot be regarded as a condition precedent of the other party's obligation unless an express intention to this effect appears.

It is settled that—

> "A plaintiff whose performance is due subsequently to that of the defendant need not allege or prove either performance or tender on his part. . . . The burden is thrown upon the defendant to allege the failure of consideration which will excuse him from liability."

2 Williston, Contracts, sec. 884.

Therefore, when the buyer paid the full contract price and received oil of grossly inferior quality, the seller's obligation to respond in damages for breach of the warranties of the contract became complete. The petitioner could have commenced an action immediately, and certainly long before the time when it was obliged to return the drums.

It follows that there was no error in the conduct of the trial of which respondent could complain. Since no such issue was raised by the pleadings, the judge could not properly have instructed the jury concerning the effect of the alleged subsequent breach on petitioner's right to recover for breach of warranty. "It is reversible error for the judge in his charge, for the first time so far as appears, to suggest a ground of exoneration for breach of contract, which was not open under the pleadings."

Mark v. *Stuart-Howland Co.*, 226 Mass. 35, 42 (1917).

B. Under the Rules of the District Court a Defense Based upon Frank L. Young Company's Breach could be Raised at the Trial only by Motion for Directed Verdict. It was Not so Raised.

Assuming that a defense based upon Frank L. Young Company's breach of contract was put in issue by the pleadings, appropriate steps under the District Court rules were not taken to raise the question at the trial or to preserve respondent's rights on appeal.

A motion for directed verdict was filed (R. 13), but was not presented to the court and was not ruled upon. No objection or exception was taken to any ruling or failure to rule with relation to the motion for directed verdict.

Respondent sought to raise this question before the district judge by the following requests for instructions (R. 58-59):

"1. Upon all the evidence your verdict must be for defendant, McNeal-Edwards Company.

"6. That where a person owes a duty to do an act by virtue of the obligation placed upon him by a valid contract, he has no right to knowingly do another act which will make it impossible for him to fulfill that obligation. To apply this to the case at bar, Frank L.

Young Company, owing a duty to return the drums promptly, had no right by their intentional act to cause the drums to be placed in custodia legis, that is, under attachment, and to claim that they were therefore unable to so return them to McNeal-Edwards Company.

"7. To so place them under attachment as described in the foregoing request, and to still retain them, constitutes a breach of the contract in suit, and your verdict must be for the defendant."

It will be observed that by these requests the court was asked to direct a verdict for the defendant. Request No. 1 is in terms a request for a directed verdict. Requests Nos. 6 and 7 are in effect one request—the premise and conclusion of the proposition of law advanced by counsel for McNeal-Edwards Company. These, too, ask expressly for a directed verdict.

Under the rules of practice prevailing in the District Court for the District of Massachusetts any attempt to raise the question of the insufficiency of the plaintiff's case by means of requests for rulings is improper and such requests must be denied.

"To pass upon such a request other than to deny it would violate Common Law Rule 44 of the Superior Court." *Patton* v. *DeViney*, 259 Mass. 100, 102 (1927). To similar effect are *Carp* v. *Kaplan*, 251 Mass. 225 (1925), and, more recently, *Palefsky* v. *Connor*, Adv. Shs. 531, 534 (1930).

The rule referred to reads, in part, as follows:

"The question whether the court should order a verdict must be raised by a motion. Such question shall not be raised by a request for instructions to the jury."

This, together with the other rules of the Superior Court, has been adopted by the United States District Court for the District of Massachusets by Rule 35 of said court:

"Cases Not Otherwise Provided For

"In all cases not provided for by the rules of this court, causes at law shall proceed as nearly as may be advisable in accordance with the law for the time being of the Commonwealth of Massachusetts and the rules of the Superior Court of said Commonwealth."

The application of the Superior Court Rule 44, it should be noted, is not due to the Conformity Act, but to its express adoption by Rule 35 into the practice of the District Court

Apart, therefore, from their inapplicability to the issues raised at the trial, and because they violated the rules of court, the respondent's requests were necessarily refused.

II.

Upon the Principles of General Commercial Law Applicable to this Transaction, a Defense Based on the Unreasonable Detention of the Drums, even if it had been Duly Raised, would be Insufficient to Bar the Petitioner's Action.

The Circuit Court of Appeals purported to be applying Massachusetts law to this transaction, and in so doing assumed a state of facts which, it will be shown later (pp. 66-70), did not exist. Petitioner contends that the decision should have been governed by the recognized principles of general commercial law, by which a breach not going to the essence of the contract is not a bar to recovery on the contract, but only matter in mitigation of damages. Petitioner further contends that, even if the court could properly follow Massachusetts law, it erred in holding that the particular doctrine typified by *Sipley* v. *Stickney*, 190 Mass. 43, was applicable regardless of the unsubstantial nature of the breach, the independence of the promise broken, and the lack of bad faith on the part of the petitioner.

A. THIS IS THE TYPE OF CASE IN WHICH THE FEDERAL COURTS ARE BOUND TO FOLLOW THE GENERAL COMMERCIAL LAW.

The rule is sustained by many decisions of this court that, in determining questions of general or commercial law, the Federal courts are bound to exercise their independent judgment, and that they will not follow state decisions when such decisions are contrary to the general weight of authority.

Swift v. *Tyson*, 16 Peters, 1, 19 (1842).
B. & W. Taxicab Co. v. *B. & Y. Taxicab Co.*, 276 U.S. 518, 530 (1928).

Matters involving the consideration for a contract (*Swift* v. *Tyson, supra*); its validity (*B. & W. Taxicab Co.* v. *B. & Y. Taxicab Co., supra; Liverpool Steam Co.* v. *Phenix Insurance Co.*, 129 U.S. 397, 443 (1889); the effect of irregularities in its authorization (*Pana* v. *Bowler*, 107 U.S. 529, 540 (1882); the rights of successive assignees (*Salem Co.* v. *Manufacturers' Co.*, 264 U.S. 182, 191 (1924); the right of action for a so-called "anticipatory" breach (*H. T. Smith Co.* v. *Minetto-Meriden Co.*, 168 Fed. 777 (1909), the validity of arbitration provisions (*Jefferson Fire Ins. Co.* v. *Bierce*, 183 Fed. 588 (1910), all these and many similar questions have been held to be matters on which the Federal courts would reach conclusions independent of state decisions. Whatever doubt may be entertained with respect to the rule of *Swift* v. *Tyson* as an original proposition, the authority of that case is not questioned within its proper scope, and the present case falls clearly within the rule and requires no extension.

In addition to the general commercial nature of the question of law presented, it seems proper to point out that the facts involved in the transaction peculiarly require the application of general commercial law. The transaction was largely consummated outside of Massachusetts, though not confined to any one state. Thus, the contract was made in

Maryland and the oil was to be delivered f.o.b. Baltimore; payment was to be made by "cash against documents," presumably on delivery of the documents in Baltimore; the "drums to be returned to sellers, freight prepaid," a performance not completed until the drums reached Virginia. Entirely apart from questions which might otherwise arise concerning the proper law of contract (American Law Institute: Conflict of Laws, Restatement, secs. 384, 385) the transaction was a general commercial transaction, over which the laws of different states had at least some control, rendering this case peculiarly apt for the application of the general commercial law.

B. It is the General Commercial Law that Only a Substantial Breach by the Plaintiff of a Promise Going to the Essence of the Contract can Bar Recovery. Any Other Breach is Cause Only for Recoupment or a Separate Action.

It is submitted that it is not, and never was for any length of time, a part of the law of commercial dealings that a slight deviation of one party from the terms of the contract bars him from recovering against the other party for nonperformance. The doctrine that the plaintiff must always show his own *complete* performance of the contract as a condition of recovery never gained a foothold in the law. Applied first by Lord Mansfield, it was discarded by that same eminent judge four years later in *Boone* v. *Eyre*, 1 H. Bl. 273 (1777).

Boone v. *Eyre* needs no discussion in this Court. Through the medium of Serjeant Williams' third rule, based on this case, it has become deeply rooted in English and American decisions alike that "*where the Plaintiff has broken the contract in some particular, and the breach of contract on the Plaintiff's side goes only to part of the consideration, and may be paid for in damages, it is matter for a cross action*

or an allowance, and does not bar the Plaintiff altogether" [per Lord Blackburn, (7 H.L. at 814)].

The rule is restated by Lord Ellenborough in *Davidson* v. *Gwynne*, 12 East, 381, 389 (1810):

> "It is useless to go over the same subject again, which has been so often discussed of late. . . . The principle laid down in *Boone* v. *Eyre* has been recognized in all the subsequent cases, that *unless the non-performance alleged in breach of the contract goes to the whole root and consideration of it, the covenant broken is not to be considered as a condition precedent but as a distinct covenant, for the breach of which the party injured may be compensated in damages.*"

More recent English cases following *Boone* v. *Eyre* are—

Newson v. *Smithies*, 3 H. & N. 840 (1858).
Inman Steamship Co. v. *Bischoff*, 7 App. Cases, 670 (H.L. 1882).
General Billposting Co., Ltd., v. *Atkinson*, [1909] A.C. 118, 121.

This Court recognized the same rule in the case of *Goldsborough* v. *Orr*, 8 Wheat. 217, 224 (1823), and again in *Emigrant Co.* v. *County of Adams*, 100 U.S. 61 (1879), saying, in the latter case:

> "But here the contract was largely carried into execution soon after its inception. The engagements of the appellants to introduce settlers and the like were to be performed in the future; and their performance was not made a condition, but, as before stated, rested in covenant. In case of a breach they would lay the foundation of an action but nothing more."

Among the Circuit Courts of Appeals the leading case is *Kauffman* v. *Raeder*, 108 Fed. 171 (1901, 8th C.C.A.), but the following language from *Barnett Foundry Company* v.

Crowe, 219 Fed. 450 (1915, 3d C.C.A.) restates the doctrine of *Boone* v. *Eyre* perhaps more succinctly:

> "These questions are controlled by the principle of law that a breach of a covenant, which goes to the whole consideration of a contract gives to the injured party the right to rescind the contract or to recover damages for the breach; or stated conversely, a breach of the *covenant which does not go to the whole consideration of the contract, but which is subordinate and incidental to its main purpose, does not constitute a breach of the entire contract or warrant its rescission by the injured party.* . . . While every breach of a contractual relation confers a right of action upon the injured party, it is thus seen that *every breach does not operate as a discharge.*"

For cases in other circuits see —

Ainesworth Coal & Iron Co. v. *Grangesberg Oxelosund*, 287 Fed. 291, 295 (1923; 4th C.C.A., quoting *Boone* v. *Eyre*).

McDonough v. *Evans Marble Co.*, 112 Fed. 634 (1902, 6th C.C.A.).

Central Appalachian Co. v. *Buchanan*, 73 Fed. 1006 (1896, 6th C.C.A. per Taft, J.).

Busch v. *Stromberg-Carlson Co.*, 217 Fed. 328, 333 (1914, 8th C.C.A.).

Hartman v. *Ruby*, 16 App. D.C. 45, 57.

Neenan v. *Otis Elevator Co.*, 180 Fed. 997, 1000 (1910, S.D. N.Y. per Hand, J.).

Cases following *Boone* v. *Eyre* in the State courts are legion, but the following have been selected as presenting decisions on facts closely analogous to those now before the Court:

Kinney v. *Federal Laundry Co.*, 75 N.J. L. 497 (1907).

Rioux v. *Ryegate Brick Co.*, 72 Vt. 148, 155 (1900).

Turner v. *Mellier*, 59 Mo. 526, 536 (1875).

Liggett v. *Smith*, 3 Watts (Pa.), 331 (1834).

Morrison v. *Galloway*, 2 Harris & J. (Md.) 461, 467 (1809).

Danville Bridge Co. v. *Pomeroy*, 15 Pa. State, 151 (1850).

Farmers &c. Bank v. *First &c. Bank*, 152 S.E. 403 (N.C. 1930).

Because of the emphasis placed by the court below on Massachusetts law, it seems appropriate to close this wealth of citations with language from Chief Justice Shaw (*Mill Dam Foundery* v. *Hovey*, 21 Pick. 417, at 439 (1839)), indicating how fully the doctrine of *Boone* v. *Eyre* has been adopted by the Massachusetts courts:

> "3. The non-performance on one side must go to the entire substance of the contract, and to the whole consideration, so that it may be safely inferred as the intent and just construction of the contract, that if the act to be performed on the one side is not done, there is no consideration for the stipulations on the other side. And therefore though there be a breach of an express or implied covenant on one side, attended with some loss and damage to the other, yet if it does not go to the whole consideration, and the loss can be compensated in damages, the stipulation must be construed to be independent, for breach of which the party sustaining such loss has his remedy by action, but it is not a condition precedent, upon the non-performance of which the other party is absolved from the performance of the stipulations on his part."

C. The General Commercial Law Principle of Boone v. Eyre is Equally Applicable Though the Plaintiff has Voluntarily Defaulted in the Performance of a Collateral Provision of the Contract.

The Circuit Court of Appeals in its first opinion announced a doctrine that an intentional breach by one party of a provision of a contract, however insignificant, constitutes a bar to any suit by him on the contract. For this doctrine, urged by the respondent, the court relied principally on the Massachusetts case of *Sipley* v. *Stickney*, 190 Mass. 43 (1906).

In *Sipley* v. *Stickney*, a resident of New York owning a farm in Sheffield, Massachusetts, hired the plaintiff to run the farm for him. It was alleged in the answer (being set up as an affirmative defense, as required by Massachusetts law) that—

> "the plaintiff in his monthly accounts had intentionally misstated the debts in running the farm to deceive the defendant."

The court held that, if this was true, the plaintiff was entitled to recover no wages. The court said:

> "We are of opinion that a wilful default in the performance of a stipulation not going to the essence of the contract bars a recovery . . . Where the plaintiff has honestly tried to perform his contract, it is one thing to hold that it must have been the intention to make the commission of such a breach a condition precedent. But where the default is wilful the question in our opinion is a different one."

The actual decision in *Sipley* v. *Stickney* need not be seriously questioned. It is quite clear that the court had before it a case in which the breach was (*a*) substantial, and (*b*)

not only intentional, but fraudulent and in bad faith. The plaintiff was suing for wages, and the performance of services was of course a condition precedent to the recovery therefor. The rendering of reports by the plaintiff was a part of his services. The dishonest reports not only were a breach of the essential obligation of fidelity (2 Williston, Contracts, sec. 1022; *Peterson* v. *Mayer*, 46 Minn. 468 (1891), but colored the entire performance of the plaintiff's service with dishonesty and rendered fundamental certain breaches which if innocent might have been regarded as unimportant.

The Massachusetts court did not, we believe, intend to lay down a general doctrine that every wilful breach of a stipulation, however remote and subsidiary, bars recovery upon the principal obligation of the contract, regardless of the accepted rules of dependent and independent covenants and regardless of the facts of the particular case. And subsequent Massachusetts decisions bear out this belief, for the court which decided *Sipley* v. *Stickney* understands it to apply only to cases where the breach is substantial:

> "The defendant contends that the plaintiffs by their wilful default have lost their rights under the contract . . . This rule rests upon an intentional departure or wilful default in the performance of a *substantial* stipulation of the contract. *Sipley* v. *Stickney.*"
>
> *Cobb* v. *Library Bureau*, Adv. Shs. 1733 (1929).

Or in bad faith:

> "That is in substance an agreement that he acted *in good faith*, and for that reason this case does not come within *Sipley* v. *Stickney.*"
>
> *Maloon* v. *Barrett*, 192 Mass. 552, 554 (1906).

And at the risk of repetition we point out again that the Massachusetts court had before, and has since, applied the

doctrine of *Boone* v. *Eyre* and apparently does not regard *Sipley* v. *Stickney* as contrary to these decisions.

See *Mill Dam Foundery* v. *Hovey*, 21 Pick. 417, 439, *supra*.

Knight v. *The New England Worsted Co.*, 2 Cush. 271, 286 (1848).

Cavanaugh v. *Tyson*, 227 Mass. 437 (1917).

If, nevertheless, the language of the Massachusetts court in *Sipley* v. *Stickney* is to be taken as laying down a general doctrine that every wilful breach of a stipulation, however remote and subsidiary, bars recovery upon the principal obligation of the contract, we maintain that the doctrine is erroneous, and should not be adopted as a part of the general commercial law of the Federal courts.

Such a doctrine runs counter to the long list of decided cases cited at pages 56 to 59 of this brief, *supra*. In all of these cases defining the rules of dependent and independent agreements, no mention is made of the wilfulness or lack of wilfulness of the plaintiff's breach. The point considered is whether such breach was substantial, whether it went to the root of the contract, or whether it was collateral, going merely to a part of the consideration, and could be compensated for in damages. In all of the cases in which the plaintiff's breach is held not to have gone to the essence of the contract, the next logical inquiry under the Massachusetts rule for which the respondent contends should have been whether the breach was wilful. Yet in none of the cases cited does the court suggest such an inquiry or intimate that such fact, if found, would have produced a different result.

On the contrary, with full recognition of the state of facts where a party has by his deliberate act broken or incapacitated himself from performing a minor promise of the contract, courts and textwriters alike hold that the obligation

of the other party is not discharged or its non-performance excused by proof of the breach by the plaintiff. Thus, the court said in *Barker & Stewart Lumber Co.* v. *Edward Hines Lumber Co.*, 137 Fed. 300 (1905), at p. 308:

> "The promisor may by his voluntary, wrongful act wholly and absolutely disable himself from performing a severable part of the contract. But such act is not intended to excuse performance of other parts of the contract, and does not go to the whole consideration, scope, or purpose of the contract, nor render unattainable its main object."

See also—

Mayo v. *American Malting Co.*, 211 Fed. 945 (1914, 4th C.C.A.).
Carpenter v. *Cresswell*, 4 Bing. 409 (1827).
Stavers v. *Curling*, 3 Bing. N.C. 355 (1836).
And see Page, Contracts, sec. 2915.

The doctrine announced by the Court of Appeals in this case is in fact an unwarrantable importation from the law of quasi-contracts, by which a plaintiff, like a builder under a building contract who has failed to build the building precisely as called for by the specifications, is permitted to recover on a *quantum meruit* provided his performance has been substantial and in good faith. *Homer* v. *Shaw*, 177 Mass. 1 (1900).

The rule of quasi-contracts is correctly referred to and defined by Judge Hand in *Susswein* v. *Pennsylvania Steel Co.*, 184 Fed. 102, 108 (1910), as follows:

> "Where one party has performed a part of an obligation and without excuse refuses to complete the performance which as a whole is a condition precedent, he may not sue in the common counts on a quantum meruit

for what he has done. The rule has absolutely no application where the performance is not a condition precedent to the express obligation arising under the contract, and it merely decides that the party who has received the performance may in good conscience keep it, in view of the other party's wilful default."

No such doctrine should be applied where the plaintiff is seeking to recover upon the principal obligation of an express contract, has fully performed everything required of him at the time of the defendant's breach, and has failed merely in the subsequent performance of a subsidiary stipulation going only to a small part of the consideration.

D. Upon the Facts of This Case, the Foregoing Principles Require a Ruling that Petitioner's Detention of the Drums was Not a Good Defense to This Action.

On analysis of this case, one must inevitably conclude that *it was the primary intention of the parties to buy and sell a quantity of Prime A fish oil* at a stated price per gallon, and *the provisions for delivery in drums and return of the drums were ancillary to this main purpose.* Of necessity, this latter provision could not be performed until some time after the purchase and sale was completed. The petitioner's breach therefore concerns only a collateral and ancillary provision of the contract which in no way touches the heart of the consideration and which, necessarily performed some time later than the main covenants, must be regarded as independent of them.

The case at bar obviously falls within the long line of authorities of which *Boone* v. *Eyre* stands at the head. The breach by the petitioner not only could be, but actually was, compensated in damages awarded in the companion case brought by the respondent, which case went to judgment on June 25, 1928 (R. 75). It is suggested, moreover, that re-

spondent's declaration in failing to allege performance of the contract on its part (see Declaration, Exhibit "F," R. 78) shows the natural interpretation that it then placed on the stipulation for the return of the drums, namely, that such stipulation was an independent promise, severable from the rest of the contract and compensable in damages.

The applicability of *Boone* v. *Eyre* being fully established, the only remaining question is whether the detention could be ruled as a matter of law to be such a substantial breach that in all justice and fairness it must be held to bar the petitioner's right of action for respondent's clearly material antecedent breach in delivering goods worth about half the value of those called for in the contract. Aside from the fact that it is rarely possible to rule on the substantiality or materiality of a breach as a matter of law, except in obviously flagrant cases, such question being properly for the jury—

> See 2 Williston, Contracts, sec. 866;
> *Montreal Cotton &c. Co.* v. *Fidelity &c. Co.*, 261 Mass. 385, 391 (1927)—

the impossibility of such a ruling in this case admits of no doubt, in view of the insignificance of petitioner's breach in comparison with the size of the transaction involved and the magnitude of the respondent's breach. The transaction involved the sale of $18,000 worth of oil; the respondent's breach has been assessed at $10,700; the petitioner's breach has been assessed at $100.

If the question of the good faith of the Young Company is at all material to the application of the principles of law already discussed, the action of the Young Company was clearly not in bad faith. It clearly was not fraudulent. The failure to return the drums was in the same category as the failure to bring in emigrants (*Emigrant Co.* v. *County of Adams*); the failure to extend the railroad to the mine in *Central Appalachian Company* v. *Buchanan, supra;* the

failure to turn over the securities in *Kauffman* v. *Raeder, supra;* the failure to purchase the coal in *Ainesworth Coal & Iron Co.* v. *Grangesberg Oxelosund, supra,* and the failure to honor orders sent by the agents in *Mark* v. *Stuart-Howland Co., supra,* none of which was held sufficient to bar the plaintiff's right to action.

III.

Even if a Wilful Breach of an Independent and Ancillary Provision of a Contract should be Held to Bar Recovery, the Facts of This Case do Not Bring it within This Rule.

It has already been pointed out that the wilfulness of a plaintiff's breach may be relevant in determining whether the breach was substantial; but that, if the breach, in spite of its wilfulness, is still unsubstantial, it is no defense. The Circuit Court of Appeals, however, adopted the rule that any wilful breach, regardless of whether it was substantial or went to the essence of the consideration, constituted a defense. We now assume for purposes of argument that this rule is a correct one, and proceed to demonstrate that, even upon this assumption, the facts of this case do not bring it within the rule.

The drums in question were retained by Frank L. Young Company until September 15, 1922, and then were attached by the sheriff in the first action of *Frank L. Young Company* v. *McNeal-Edwards Company.* The ruling in the first opinion of the Circuit Court of Appeals was that the detention up to September 15, 1922, constituted a wilful breach. This conception originated with the Circuit Court of Appeals. The respondent's counsel had argued, and presumably still contends, that the attachment on September 15 constituted a wilful breach. These two contentions will now be considered.

A. The Record Discloses No Evidence upon Which the Jury could Find, Much Less be Compelled to Find, that the Petitioner's Breach was Wilful or Intentional.

The original opinion of the Circuit Court of Appeals ruled that the detention of the drums to September 15 was wilful, and required a directed verdict for the defendant. It should be observed that by this ruling the court below declared not only that the jury could find that the breach was wilful, but on the evidence must have so found. The defendant made no request for instruction asking that the jury be permitted to pass upon the intentional nature of the breach. Its only requests for instruction were requests for peremptory direction of a verdict. We submit that the ruling of the court below was based upon the assumption of a state of facts entirely unwarranted on the record before it.

Whether an alleged breach of contract is substantial, and whether it is wilful or merely negligent, are questions of fact peculiarly within the domain of the jury.

Montreal Cotton &c. Co. v. *Fidelity &c. Co.*, 261 Mass. 385, 391 (1927).

Now there is no finding by the jury that the detention of the drums was a wilful breach. Under the issues arrived at on the pleadings of *McNeal-Edwards Company* v. *Frank L. Young Company*, certain questions were submitted to the jury: (1) whether the retention of the drums "from the time when they were received (about January 28, 1922) to 15 September 1922, when they were attached" was "an unreasonably long detention of them; and (2) if so, what money damage was sustained. The jury answered "Yes" to question 1 and "$100" to question 2. Certainly nothing in these answers—if they can properly be considered in this case at all—could be construed as a finding of wilfulness.

Likewise, the only two questions arising on the pleadings of this case—whether the oil was of the quality and grade required by the contract and what the damages were—were submitted to the jury for special findings, and both were found in favor of the plaintiff (R. 14).

The proof relating to the retention of the drums is meagre and inextricably bound up with that dealing with the viscosity of the oil. But, at the risk of tediousness, counsel have attempted to restate in *Appendix A*, at the end of this brief, all the evidence dealing even remotely with this point of the case, with full confidence that the Court, after reviewing the case thus presented, will decide that the jury could not be permitted to find the detention of the drums a wilful breach, much less be required so to find.

This evidence shows that the oil was received in January, but was not dumped from the drums until summer, because its viscosity prevented dumping until hot weather. It is also apparent that the officers of Frank L. Young Company quite reasonably wanted the oil kept in the original containers until the controversy as to its quality had been settled, so that no question of identity of the oil could arise.

It is obvious that the jury's finding that the drums were detained unreasonably long is based on the unexplained fact that, while the drums were gradually emptied during July and August, they remained still in the buyer's possession in the middle of September. The mere failure to explain this continued possession did not, however, and could not warrant the conclusion that such continued possession was a wilful default under the contract.

It follows, therefore, that there was no basis for the assumption by the Circuit Court of Appeals that the breach was wilful, and that in rendering its decision predicated upon such an assumption the said court committed grave error.

B. The Attachment of the Drums on September 15, 1922, was Not a Breach of Contract by Petitioner.

In the Circuit Court of Appeals counsel for the respondent argued, and presumably still contends, that the action of Frank L. Young Company in having the sheriff attach the drums on September 15, 1922, was a breach of the contract to return the drums in a reasonable time. Of course, if this was a breach at all, it was an intentional breach. But the short answer is that such attachment was no breach of the contract. General Laws, c. 223, sec. 42, provides that "all real and personal property liable to be taken on execution may be attached upon the original writ." It was in exercise of this statutory right that Frank L. Young Company, a creditor of McNeal-Edwards Company to the extent of $10,700, attached the drums in question. The respondent suggests that by virtue of the contract now before this Court Frank L. Young Company is barred from the rights of attachment which any other creditor of McNeal-Edwards Company would have. Can it be that Frank L. Young Company, with an execution for over $10,000, would be unable to satisfy its judgment out of this property? It would hardly seem that a court should so hold in the absence of binding authority. And the statute expressly provides that if execution could be levied on the property, it can be attached. It is submitted that the District Court properly held that the exercise by the plaintiff of its rights of attachment could be no breach of the contract.

It is further submitted that this question does not arise *de novo* between these parties in this proceeding. *It has already been adjudicated* in the suit of *McNeal-Edwards Company* v. *Frank L. Young Company.* The declaration in that action appears on page 78 of the record. In count 1 McNeal-Edwards Company, after setting forth the contract, declares "that it was a part of the defendant's obligation under the contract for said sale forthwith to remove the oil from said drums and to return the latter, freight prepaid, to

the plaintiff at said Reedsville; but the plaintiff has refused and neglected and still refuses and neglects to return said drums to the plaintiff as aforesaid to the great damage of the plaintiff as set forth in its writ." This action of McNeal-Edwards Company to recover for Frank L. Young Company's failure to return the drums was tried together with the action now before the Court (R. 17). Judge Morton's charge in the District Court (R. 67-71) declared that Frank L. Young Company's breach, if any, consisted in the retention of the drums an unreasonably long time to September 15, and not the attachment of the drums on September 15. Upon this charge the jury returned a verdict for McNeal-Edwards Company in the sum of $100, and the case went to final judgment on June 25, 1928, as was above stated (R. 75). It therefore appears that the precise question has been before a court of competent jurisdiction in litigation between these parties, and that a final judgment has been rendered that Frank L. Young Company broke its contract by retaining the drums an unreasonably long time up to September 15, but did not break it by attachment of the drums on September 15. Consequently, it is *res judicata* that the attachment of September 15 was no breach of the contract by Frank L. Young Company.

IV.

No Error is Disclosed in the Other Rulings of the Trial Court of which the Respondent Complains.

The respondent's assignments of error Nos. 1, 2, and 3 (R. 83) in the court below were based on the jurisdictional question covered by pages 5 to 43 of this brief. Assignments Nos. 4, 7, and 8 (R. 83-84) were based on the proposition that this action was barred by the petitioner's detention of the drums and are covered by pages 43 to 70. The remaining assignments (Nos. 5, 6, and 9) are of relatively minor importance, and although they were not pressed by respon-

dent in the court below, we here consider them for the sake of completeness.

A. Assignment of error No. 5 is based on the court's denial of the requested ruling that "the plaintiff accepted the oil delivered under the contract in suit." Such a request was totally immaterial to the issues raised in this case. The plaintiff never contended that the oil had not been accepted within the definition of the Uniform Sales Act which is in force in both Maryland and Massachusetts (Mass. General Laws, chapter 106; Maryland Code, article 83). Under the Sales Act, questions of acceptance arise only in case a buyer is seeking to rescind the contract or to refuse to receive the goods. In the present case the buyer received the goods, accepted them, and seeks to recover damages for breach of warranty. Acceptance of the goods has no effect upon the right of the buyer to recover damages for breach of warranty:

> "In the absence of an expressed or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or any other remedy for breach of any promise or warranty in the contract to sell or the sale."

See Uniform Sales Act, sec. 49.
Mass. General Laws, c. 106, sec. 38.
Maryland Code, art. 83, sec. 70.

Such was also the common-law rule in many American states, including Maryland and Massachusetts.

See 2 Williston, Sales, sec. 488.

B. Assignment of error No. 6 is the refusal to rule that there was no evidence that the plaintiff made known to the defendant the purpose for which the oil was to be used, and that the plaintiff cannot recover under the third count of its declaration. This request, although not given in terms, was adequately covered by the judge's charge. The only differ-

ence between recovery on the first count of the declaration (based upon breach of express warranty) and recovery on the third count (based upon breach of implied warranty of fitness for a particular purpose) is in the measure of damages. The court correctly instructed that the amount of recovery was the measure of damages under the first count, viz., the difference between the value of the goods delivered and the value of the goods contracted for, and that the question for the jury on the issue of liability was solely whether the oil delivered was Prime "A" Menhaden Oil (R. 65). It may be mentioned that respondent expressly waived this assignment of error in its first brief.

C. The last assignment of error (No. 9) was based on the proposition that the judgment of Thompson and Gascoyne was conclusive on the parties as to the grade and quality of the oil, and that no evidence could be admitted on this subject.

It is sufficient answer to quote from the contract and the trial judge's oral statement in ruling such evidence admissible. The contract of sale provides that—

> "Oil to be gauged and sampled by George A. Thompson at time of shipment. If Gascoyne and Company's test of sample drawn by George A. Thompson at time of gauging shows free fatty acid in excess of 5%, sellers to make customary allowance to buyers for each One Per cent, or fraction thereof, above 5% Free Fatty Acid."

(The "purchase order" and "broker's note" differ slightly in their phrasing, but reach the same result (R. 18). And Judge Morton, overruling respondent's objection to the evidence, said:

> "Well, it lies in my mind this way: that the suggestion is that the contract removes any point of doubt or debate about the quality of goods shipped because the contract appoints a certain person as arbitrator, to de-

cide that question once and for all. Now, it is quite clear that if a term of that sort is intended to be inserted in the contract it should be put in there clearly so that it is there for anybody to read and see. I don't think this contract means that test at all. It does say, *as to acidity,* that Gascoyne's test is to be accepted by the parties and adjustment is to be made on the basis of it. Beyond that, it says that the oil is to be gauged and sampled by Thompson, but there is no statement that the grading is to be accepted by the parties as Thompson's grading, or anything equivalent to that" (R. 21).

It is the position of the petitioner (1) that the duties of Thompson were limited to measuring and taking a sample of the oil, and that he had no duty with regard to determining its grade or quality; (2) that the duties of Gascoyne involved testing the oil *for acidity,* and that he had no duty to determine whether the oil was of Prime "A" grade or any other grade or quality; (3) that neither Thompson nor Gascoyne, in fact, performed tests or rendered judgments beyond the duties just set forth; (4) that the clear language necessary in a contract to appoint a third person as arbitrator of all questions of grade and quality is missing from this contract. Consequently, it is submitted that there is no merit to this assignment of error.

THIS COURT SHOULD CONSIDER ALL QUESTIONS AND FINALLY DISPOSE OF THIS LITIGATION.

If this Court rules that the Circuit Court of Appeals was in error in its opinion that General Laws, chapter 227, sections 2 to 4, are inapplicable in the Federal courts of Massachusetts, we urgently press upon the Court the desirability of considering the other questions discussed in this brief in order that this litigation may be finally disposed of at this time.

There is no question as to the *power* of this Court to consider all questions and finally dispose of the case rather than to remand it to the Circuit Court of Appeals for further decision.

> "We have power to render such judgment as the Circuit Court of Appeals should have rendered, or we might reverse the judgment of affirmance by that court and send the case back to it to decide the question of jurisdiction which it had refused to pass on. We think it would be unnecessary hardship to the plaintiff to do the latter because of the further delay that would thereby be caused. The accident occurred in 1901 . . . and at this time, nearly seven years after the injury, the plaintiff has not yet been paid the amount of his judgment."
>
> *Boston & Maine R.R.* v. *Gokey*, 210 U.S. 155, 162 (1908).

> "In the circumstances it is open to us to deal only with the matter considered by the Circuit Court of Appeals and to remand the cases to it for any needed action upon other questions, or to proceed ourselves to a complete decision. The latter course seems the better inasmuch as counsel have united in presenting to us all questions thought to arise upon the record and the litigation already has covered a considerable period."
>
> *Cole* v. *Ralph*, 252 U.S. 286, 290 (1919).
> *Lamar* v. *United States*, 241 U.S. 103 (1916).

For several reasons it is submitted that this Court should exercise its discretion in favor of final disposition at this time:

(1) This litigation has already lasted too long. The contract which forms the basis for the action was made in January, 1922 (R. 18). The first suit with reference thereto was

commenced in September of 1922. The jury's verdict in this suit was rendered on February 10, 1928 (R. 71). Nine years have elapsed since the transaction; more than three years since the trial and verdict for the petitioner.

(2) The cost of appellate proceedings is already too large considering the amount involved. Proceedings before this Court constitute the third oral appellate argument in the case, and involve the fifth brief presented on behalf of the petitioner.

(3) But of foremost consideration is the fact that the matter of contract law involved on the merits is one which would itself appropriately form the basis for a petition for certiorari to this Court however the Circuit Court of Appeals might decide it. By reference to the first opinion of the Circuit Court of Appeals (R. 86-89) the Court will observe that in spite of an overwhelming number of contrary decisions in other circuits and in England, and on the basis of *Sipley* v. *Stickney*, a Massachusetts case inapplicable on the facts, the court below ruled that the plaintiff's breach of contract to the extent of $100 wholly incapacitated it from recovering for the breach of the defendant in the amount of $10,700. The fallacies involved in that opinion are fully considered *supra*, pages 43 to 66. Suffice it to say that it is apparent that an important question of the general commercial law of contracts is involved, upon which the losing party under another decision of the Circuit Court of Appeals would unquestionably seek review by this Court. In view of this circumstance it would seem quite appropriate that the Court should undertake complete disposition of the case at this time.

Respectfully submitted,

JOHN G. PALFREY,

W. BARTON LEACH,

Attorneys for Petitioner.

CHARLES F. ALBERT,

Of Counsel.

APPENDIX A.

Collection of Evidence re Detention of the Drums.

Testimony of Cedric F. Lee (R. 22):

"The oil was pressed several months later, in July or August, 1922. It had been received the latter part of January. We attempted to dump it from the drums during the winter months. We first attempted to take the oil from the drums in July or August because in the first place there was a dispute between the sellers and the purchasers, and the instructions were to hold off until some settlement had been reached, . . . and in the second place it would have been impossible to do so in cold weather. . . . I observed it being dumped from the drums in July and August, 1922. In the summer time it takes from one to five minutes and in the winter it takes from five to ten minutes to dump a drum of Prime A Menhaden Oil. I should say it took half an hour to dump this and some went even an hour or an hour and a half."

Same witness (R. 25):

"Drums were kept in the yard for three or four weeks in the sun before they were poured, in July and August."

Testimony of Albert Sears (R. 26):

"I first saw the oil in July or August in the chilling-room."

Testimony of William B. Schutt (R. 27):

"I had to do with dumping that oil. I think that Mr. Lee's description is just right. It was dumped in warm weather, in the summer of 1922."

Testimony of Percy L. Young (R. 30):

"We complained at several times during the controversy we had with them. It was strung out over a period of months, I believe."

Same witness (R. 31):

"After we had actually dumped the entire lot, we found it very difficult to work. It didn't act like any other oil we had in the plant, but we didn't know that at the time of the original complaint, shortly after the arrival of the stuff, because we didn't have occasion to dump it or work it through our presses."

Same witness (R. 32):

"The drums are piled in the back yard of Frank L. Young & Company."

Excerpt from Plaintiff's Exhibit 7, a letter from Frank L. Young Company to McNeal-Edwards Company, dated June 10, 1922 (R. 32, 33):

"Inasmuch as we have been requested several times by Messrs. Reilly-Edwards Co. to return the 1107 drums (which you shipped us) when emptied, we feel that we should let you know just how the matter stands.

"The facts of the case are that the oil contained in the drums is so thick that it is almost impossible to empty them. We naturally felt that with the advent of warm weather the oil would become perfectly limpid and empty out readily, because we have never had any oil before but would thin out in warm weather and become in a measure workable. . . .

"Mr. Edwards of Reilly-Edwards Co. was in Boston a few days ago, and at our request he visited our factory and looked over the goods and watched our men trying

to empty a few drums. . . . . we feel that you owe it to us to send one of your concern or one of your representatives to visit us and see for yourselves that conditions are absolutely as we state."

Excerpts from Plaintiff's Exhibit 8, a letter from McNeal-Edwards Company to Frank L. Young Company, dated June 20, 1922 (R. 34):

"Their (*sic*) is no need of us sending a representative to your place to see the oil, we expect you to ship the drums as soon as possible."

Testimony of John L. Rounsevell (R. 34):

"Employed by Frank L. Young Company in the summer of 1922, after July 15th, as assistant to the superintendent, Mr. Lee. I saw, I think, about thirty-five or forty drums of McNeil-Edwards oil dumped. I went away about the middle of August. I noticed that the oil was very thick for oil to be at that time of the year."

Testimony of Cedric F. Lee, recalled (R. 39):

"I have testified that the oil was leaking from these drums in February, and that when I saw them in August it would not flow freely, that is, without the aid of stirring or agitation."

Excerpt from Defendant's Exhibit A, letter Reilly-Edwards Company to Frank L. Young Company, dated April 22, 1922 (R. 80):

"Dear Sirs:

"We have received a letter from the McNeal-Edwards Company reading,—

" 'In regard to the drums that this lot of oil was shipped in, they were to be returned in a reasonable

time, and we think they have had time enough to dump them so please get after them to ship the drums back to us.' "

Excerpt from Defendant's Exhibit 3, letter Frank L. Young Company to Reilly-Edwards Company, dated July 12, 1922 (R. 80):

"In regard to empty drums for McNeal-Edwards Co., as mentioned in your letter of 7th inst., would say that as advised by phone we are not in a position to furnish the drums until they are empty, and we do not feel like emptying the drums until after McNeal-Edwards have had an opportunity to see for themselves in the original packages the kind of oil they shipped us.

"We hope we can get them to be reasonable and come up and see the goods as we requested. It certainly is not fair to make us hold the goods any longer than we have."

Excerpt from Defendant's Exhibit 2, letter McNeal-Edwards Company to Frank L. Young Company, dated July 19, 1922 (R. 81):

"We have been waiting very patiently for you to return our 1107 drums that we shipped you Jan. 18th but it seems that you have made no attempt to do so, we are sorry to have to keep after you about this matter as it is embarrassing to have to do business in this way, but we must have our drums as we need them to ship our oil now and if you cannot ship all ship what you can, please advise when and how many you will ship."

Excerpt from Defendant's Exhibit 1, dated August 22 (R. 81):

"Have you shipped any of our drums if not when and how many."

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In the

Supreme Court of the United States.

October Term, 1930.

No. 490.

Frank L. Young Company,

Petitioner,

v.

McNeal-Edwards Company.

On writ of certiorari to the United States Circuit Court of Appeals for the First Circuit.

REPLY BRIEF FOR PETITIONER.

JOHN G. PALFREY,
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Attorneys for Petitioner.

CHARLES F. ALBERT,
Of Counsel.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

In the

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FRANK L. YOUNG COMPANY,
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v.
McNEAL-EDWARDS COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

REPLY BRIEF FOR PETITIONER.

The fact that the respondent's brief does not follow the major outlines of petitioner's brief leads to the filing of this reply for the purpose of indicating the extent to which the arguments advanced in petitioner's brief are met or left uncontested.

FIRST QUESTION: APPLICABILITY OF MASSACHUSETTS STATUTE IN FEDERAL COURTS.

Respondent advances no argument on the question whether sections 2 to 4 of General Laws, chapter 227, are constitutional and applicable in the District Court for the District of Massachusetts. It relies solely upon Judge Bingham's opinion in the Circuit Court of Appeals (respon-

dent's brief, p. 5). There is no refutation of Judge Anderson's dissent in the Circuit Court of Appeals or of the arguments advanced in petitioner's brief, pages 8 to 34.

SECOND QUESTION: CONSTRUCTION OF THE MASSACHUSETTS STATUTE.

Respondent again argues that the Massachusetts statute, as a matter of construction, does not apply to these facts, since Frank L. Young Company brought a previous suit which it later discontinued. This argument is to be found partially in the "Statement of the Case" (pp. 1 and 2) and partially in the argument (pp. 4 and 5). This is the same contention that was twice advanced before the District Court and twice before the Circuit Court of Appeals. It is answered at pages 37 to 43 of petitioner's brief.

THIRD QUESTION: PETITIONER'S RIGHT TO RECOVER AS A MATTER OF CONTRACT LAW.

This seems to be the matter upon which respondent particularly relies, pages 6 to 10 of its brief being devoted to argument on this point. The following is a brief summary of petitioner's argument with notation as to the extent to which such argument is contested:

Petitioner's brief (pp. 50-52) contends that no defense based upon petitioner's breach of contract was in issue under the pleadings. This contention is not mentioned or refuted in respondent's brief.

Petitioner's brief contends (pp. 52-54) that under Rule 35 of the District Court, adopting Rule 44 of the Massachusetts Superior Court, no question of a breach by the petitioner was properly raised at the trial. Respondent notices this contention on page 10 by citing without argument the following three cases:

Chateaugay Iron Company, Pet'r, 128 U.S. 544, 553.

United States v. *U.S. Fidelity & Guaranty Co.*, 236 U.S. 512, 529.

Spokane & Inland R.R. v. *Campbell*, 241 U.S. 497, 502.

These cases tend to show that Massachusetts Superior Court Rule 44 is not adopted into the procedure of the District Court *by the Conformity Act.* Petitioner never contended that it was so adopted. We quote from page 54 of our brief: "The application of the Superior Court Rule 44, it should be noted, is not due to the Conformity Act, but to its express adoption by Rule 35 into the practice of the District Court."

On the merits of the question of contract law, petitioner's brief contends

(A) that under *Swift* v. *Tyson* this is the type of case in which the Federal courts are bound to follow the general commercial law (pp. 55-56). This is not noticed or contested by respondent's brief.

(B) that by the general commercial law only a substantial breach by the plaintiff of a promise going to the essence of the contract can bar recovery (pp. 56-60). This is not noticed or contested by respondent's brief.

(C) that the fact that a plaintiff's breach is "wilful" is immaterial, if the breach is unsubstantial or concerns a collateral provision of the contract (pp. 60-64). Respondent does not argue this question. But its brief *assumes* at page 6 that the present litigation is governed by *Sipley* v. *Stickney*, 193 Mass. 43, as if this case involved a Massachusetts contract (which it does not) and were being decided in the Massachusetts Supreme Judicial Court. It is further *assumed* (p. 6) that *Sipley* v. *Stickney, supra*, decides that all wilful breaches by a plaintiff bar recovery. That this assumption is unfounded, even with regard to the law

of Massachusetts, is argued at pages 60 to 62 of petitioner's brief.

Petitioner's brief contends that a breach by a plaintiff, whether or not "wilful," is no bar to an action unless it is substantial and goes to the essence of the consideration (pp. 54-64). If we are wrong in this, as respondent assumes, but does not argue, we contend in the alternative that on the facts of this case disclosed by the record there was no wilful breach by Frank L. Young Company (petitioner's brief, pp. 66-70). It is to this question of fact that respondent's only argument is addressed (pp. 7-10). It is pointed out at page 66 of petitioner's brief that there are two possible contentions that an intentional breach existed in this case: (1) The first possible contention is that there was an intentional breach by Frank L. Young Company in detaining the drums up to September 15, 1922. This was the view of the Circuit Court of Appeals. Respondent never has made this contention, and does not make it in this present brief. That such a contention is unsupported by the record is indicated in petitioner's brief at pages 67-68 and 76-79.[1] (2) The second possible contention is that the attachment of the drums on September 15, 1922, constituted an intentional breach. This is the view for which respondent argues at pages 7-10, as it argued in the Circuit Court of Appeals. Respondent contends that the attachment was wilful and intentional. This we concede. To quote from our brief, at page 69: "Of course, if this was a breach at all, it was an intentional breach." It is, however, our contention that it was no breach at all. We argue at page 69 that Frank L. Young Company was privileged to exercise the rights of attachment given to every creditor of McNeal-Edwards Company. This argument is answered at page 10 of respondent's brief

[1] The reference at the top of page 10 of respondent's brief to "retention of the drums for several months after they were emptied" is plainly a slip. The evidence on the point is collected in Appendix A, at pages 76-79 of petitioner's brief.

only by pointing out that petitioner's brief cites no authority. It is suggested that the burden of persuasion in establishing the validity of the defense contended for is upon the respondent, who likewise cites no authority. But petitioner further points out, at pages 69 and 70, that it has now become *res judicata* that the attachment of September 15, 1922, was no breach. This contention is not mentioned or refuted in respondent's brief.

The appositeness of Point IV of respondent's brief is not quite clear. It is there contended that petitioner's breach was not only intentional, but in bad faith—as if somehow this solved the problem. But this is not a suit in equity where the "clean hands" doctrine is applicable. Nor is it a quasi-contractual action to recover quantum meruit (petitioner's brief, pp. 63-64). It is an action at law for damages, which can be defeated only by showing a substantial breach of a promise going to the essence of the consideration. And again we point out that the breach found by the jury—*i.e.*, "an unreasonably long detention" of the drums (R. 71)—was neither "wilful" nor in bad faith according to the record (petitioner's brief, pp. 66-70).

The matters dealt with at pages 70-73 of petitioner's brief are not argued in respondent's brief, as they were not argued in the Circuit Court of Appeals, and must therefore be considered as waived.

Respectfully submitted,

JOHN G. PALFREY,
W. BARTON LEACH,
Attorneys for Petitioner.

CHARLES F. ALBERT,
Of Counsel.

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Supreme Court of the United States.

October Term, 1930.

No. 490.

Frank L. Young Company,
Petitioner,

v.

McNeal-Edwards Company,
Respondent.

Respondent's Brief.

ASA P. FRENCH,
Counsel for the Respondent.

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ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

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Supreme Court of the United States.

OCTOBER TERM, 1930.

No. 490.

FRANK L. YOUNG COMPANY,
PETITIONER,
v.
McNEAL-EDWARDS COMPANY,
RESPONDENT.

RESPONDENT'S BRIEF.

The respondent's contentions, dealing with those advanced in the petitioner's brief, appear in the order set forth therein, and, with the addition of a further statement of facts in conclusion, comprise the whole of the respondent's brief.

OPINIONS BELOW.

The petitioner, in its brief (p. 2), refers to the original opinion of *Anderson,* J., upon the merits, as being "now withdrawn." This, it is submitted, is hardly an accurate statement of the situation. It would appear rather that, the Circuit Court of Appeals having now considered the jurisdictional question involved, and having decided that question in favor of the respondent, it was quite unnecessary to reconsider its former opinion, which dealt solely with the merits of the controversy.

Jurisdiction.

There is obviously no question of the right of the petitioner to present this question in the form adopted.

The Question Presented.

The respondent contends, and has contended again and again (see Defendant's Plea in Abatement as Amended, Rec. pp. 9, 10), that the statement of fact in the first paragraph under the above heading of the petitioner's brief (p. 3) is garbled and inaccurate, and that the particular phrases "the present cross-action" and "the respondent's original action" are inappropriate and misleading.

Statement of the Case.

The respondent's version of the material facts is as follows:

In January, 1922, the respondent, a Virginia corporation, sold, through a broker in Baltimore, and shipped to the petitioner, a Massachusetts corporation in Boston, a quantity of Crude Menhaden Oil contained in drums, 1107 in number, belonging to the respondent (Rec. p. 17). The contract of sale called for "Prime 'A' Crude Menhaden Oil," and provided that the drums should be returned to the seller (p. 19). They were never returned.

The petitioner received the order, paid for it, and subsequently, in or about October, 1922 (p. 17), brought suit against the respondent in the Superior Court of Massachusetts for alleged breach of warranty of quality, predicating jurisdiction upon an attachment made by it upon, and limited to the value of, the drums in which the oil was delivered to the petitioner, and which were then in the petitioner's possession.

This suit was forthwith removed by the respondent to the District Court of the United States,—counsel appearing

"specially" in its behalf both in the removal proceedings and in the District Court.

In March, 1923, the respondent brought a cross-action in the District Court against the petitioner to recover the value of the drums attached in the above-named suit, and for their conversion. While these suits were pending in the District Court, the petitioner, on January 4, 1927, brought the present action in the District Court, seeking thereby to obtain unrestricted jurisdiction not limited to the value of the containers, and made service upon the respondent's counsel in the cross-action.

Thereafter, to wit, on February 28, 1927, the petitioner discontinued the original action in the District Court (p. 73).

The respondent seasonably pleaded in abatement of the present action, alleging, in substance (pp. 9, 10), that service, under the circumstances heretofore alleged, did not give to the petitioner the right to satisfy a judgment, if any, against any property of the respondent except the containers, but for the presence of which in Massachusetts the petitioner would have been obliged to bring its original action in Virginia, and that therefore the service attempted to be made upon the respondent's attorney was void, and of no effect.

A motion to dismiss based upon this plea in abatement was overruled, and the respondent answered over, taking proper steps to protect its rights under its special appearance. Upon trial, in February of 1928, the petitioner had a verdict of $10,730.17. The respondent, in its cross-action recovered $100, and the jury found specially that the fair value of the drums on September 15, 1922, the date when they were attached by the respondent, was $1384 (p. 71).

After the verdicts, on February 14, 1928, the respondent filed a motion in arrest of judgment in the case at bar, which was overruled by *Morton*, J., and the respondent's exception was saved (pp. 15, 16).

The respondent's petition for appeal was allowed on January 31, 1929 (p. 82), and on the same date it filed its assignment of errors, nine in number (pp. 82, 84), all of which were relied upon except that numbered 6 (p. 83).

Upon its appeal the respondent prevailed on the merits (Opinion of *Anderson*, J. (pp. 87-91)), and thereafter, upon reargument, the Circuit Court of Appeals dismissed the case for want of jurisdiction (pp. 94-114).

The petitioner now asks this Court that a writ of certiorari issue to review the judgment of the Court of Appeals.

The respondent calls special attention to the fact that, at the time when the petitioner's present action was brought, the *petitioner's original action was pending, and had not been discontinued, as stated at the bottom of page 4 of the petitioner's brief* (see Rec. pp. 14 and 73). The property [drums] described by petitioner as of "nominal value," referred to in the same sentence of that brief, was found by the jury to be worth thirteen hundred and eighty-four (1384) dollars.

It should also be noted, in passing, that nowhere in the record, as stated by the petitioner, does it appear that "For forty years these statutes have been applied in the District Court" (Petitioner's Brief, p. 6, at the top). It does appear, however, that the respondent's counsel may have questioned their applicability to the facts in this case, in that the respondent both pleaded in abatement and moved to dismiss, and later moved in arrest of judgment.

Argument.

1. With respect to the petitioner's contention that the provisions of a Massachusetts statute have been nullified.

Apart from the fact that no "pursuing" in this case can be charged against the respondent, it would appear that the correctness of an opinion of a United States Circuit Court of Appeals cannot be tested by whether or not it interferes

with State legislation. The "salutary use" of the decision in the District Court case of *Arkwright Mills* v. *Aultman*, 128 Fed. 195, does not appear in this record, but the respondent calls attention to the fact that the issues in that case were not the peculiar ones presented in the record now before the court.

In the *Arkwright* case, the service was upon "the attorney of record for the plaintiff *in the original action*" (sec. 3 of the Massachusetts statute). In the case presented upon this petition, and at the time when service was made upon the respondent's attorney, he could not correctly be so described.

2. With respect to the contention that the decision of the Circuit Court of Appeals here under scrutiny nullifies statutes of six other states besides Massachusetts (Petitioner's Brief, p. 8), it is regrettable, if true, but beside the mark, and not unusual.

3. As to the petitioner's suggestion appearing on page 7 of its brief, that seven federal judges have passed directly upon this question—

It is true that Circuit Judge *Francis C. Lowell* decided, in *Arkwright Mills* v. *Aultman & Taylor Machinery Co.*, that the service made in that case was good upon the particular facts there presented.

The respondent, however, does not concede that the opinion of *Dodge*, J., in *Coleman* v. *American Warp Company*, 235 Fed. 531, 536, "upheld the applicability of the statute."

Lowell, D.J., ruling upon the particular facts in the present case, denied the respondent's motion to dismiss; but *Morton*, J., in overruling its motion in arrest of judgment, simply passed upon the same question in another form, and applied the law of the case as established by Judge Lowell's decision.

4. Dealing with the petitioner's contention with respect to previous interpretations of this statute (Petitioner's Brief, pp. 10, 11, and 12), an examination of the case of

Champlin Refining Co. v. Gasoline Products Co., 29 Fed. (2d) 331, 338, does not, it is argued, justify the contention that the same Circuit Court of Appeals has declared the identical Maine statute to be part of the law of set-off. It clearly appears in that case that the most that was done was to refer to the existence of the statute.

5. The petitioner's contention is that the Massachusetts statute is applicable in the District Court for the District of Massachusetts, and not in conflict with any Act of Congress (Petitioner's Brief, commencing on p. 12). The argument against this contention is contained in the opinion of a majority of the Circuit Court of Appeals (pp. 98-114).

This is the first time that a federal court has undertaken to make an exhaustive and analytical examination of the statute under scrutiny, or any similar statute, and that task has been ably and thoroughly performed by Judge *Bingham* in the case here presented. Other courts have dealt with it superficially and have adopted, without question, the views of their predecessors.

Irrespective of the statute's applicability, the respondent has contended from the beginning that the facts in this case do not sustain the proposition that good and sufficient service was made upon it under that statute in the suit at bar.

6. The question of the appearance of justice.

It is respectfully urged that the "appearance of justice" to the respondent, in whose favor two decisions of the Circuit Court of Appeals have already been made in this case, renders it inappropriate that a writ of certiorari should issue.

Conclusion.

An examination of the facts discloses that the various actions in this litigation were brought in the following order:

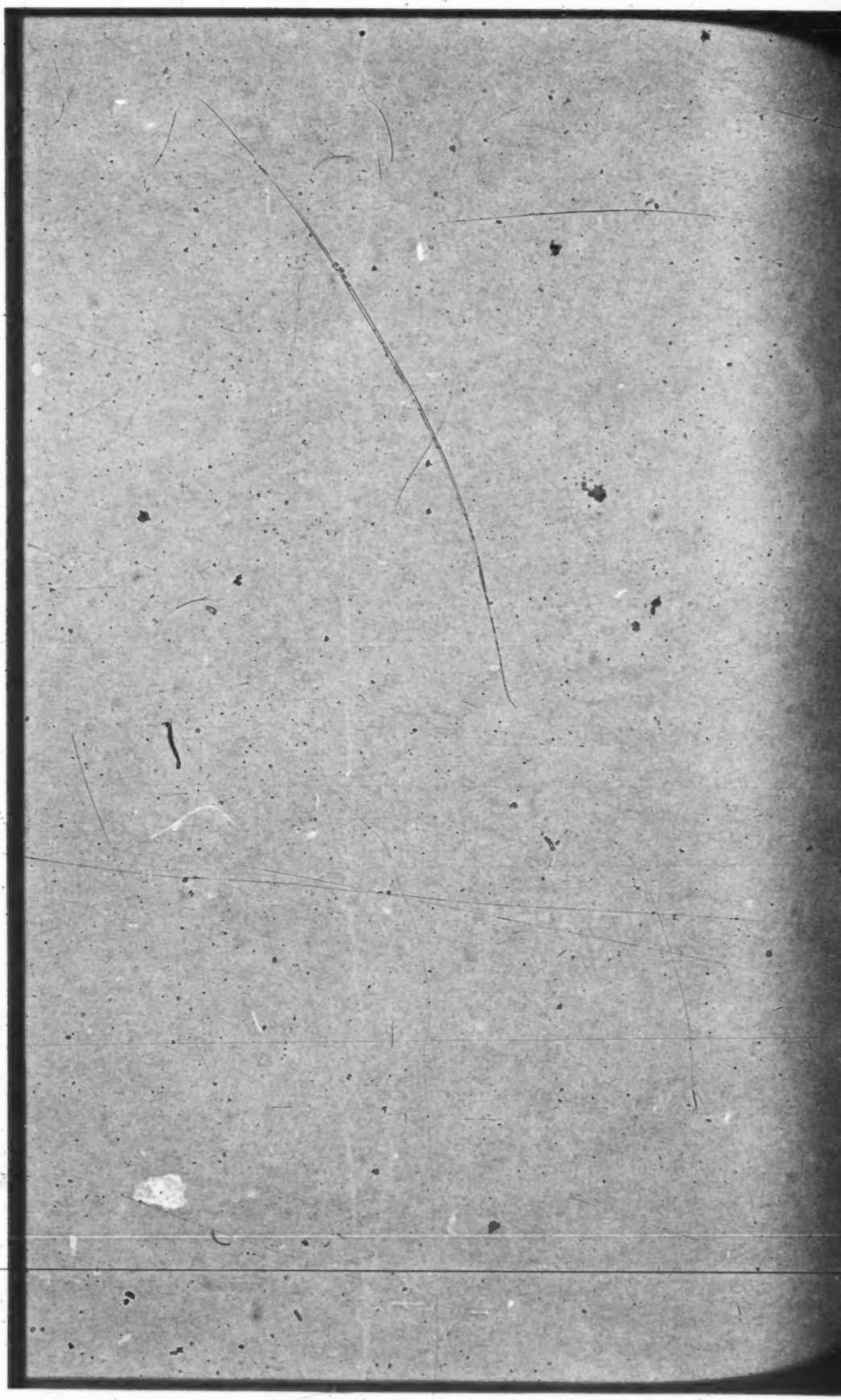
1. Petitioner's action against the respondent in the Superior Court of Massachusetts, in or about October, 1922; removed to the District Court on January 2, 1923 (p. 73); and discontinued *February 28, 1927* (p. 73).

2. Respondent's cross-action against the petitioner brought in the District Court and returnable to that Court on March 20, 1923.

3. Petitioner's action, brought on January 4, 1927 (p. 3, bottom), in the District Court for the same cause of action as that set forth in its action brought in the State court, and on that date *still pending in the Federal Court.*

In this latter suit—*which is the only one now under consideration*—service was made upon the attorney for the respondent, upon the theory that the *cross-action brought by the respondent* was an "original action" which the respondent contends it clearly was not.

Respectfully submitted,
ASA P. FRENCH,
Counsel for the Respondent.



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Supreme Court of the United States.

October Term, 1930.

No. 490.

Frank L. Young Company,
Petitioner,

v.

McNeal-Edwards Company.

BRIEF FOR RESPONDENT.

ASA P. FRENCH,
Attorney for Respondent.

JONATHAN W. FRENCH,
Of Counsel.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

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Mass. G.L. c. 227, secs. 2, 3	3

Supreme Court of the United States.

OCTOBER TERM, 1930.

No. 490.

FRANK L. YOUNG COMPANY,
PETITIONER,

v.

McNEAL-EDWARDS COMPANY.

RESPONDENT'S BRIEF.

STATEMENT OF THE CASE.

The material facts in this controversy are meager, and not in dispute. They are as follows:

In January, 1922, the petitioner, a Massachusetts corporation, hereinafter called the buyer, purchased, through a broker in Baltimore, from the respondent, a Virginia corporation, hereinafter called the seller, a quantity of Crude Menhaden Oil contained in drums, 1107 in number, belonging to the seller (Record, pp. 16, 17).

The contract called for "Prime 'A' Crude Menhaden Oil," and stipulated that the drums should be returned to the seller. They were never returned. The buyer received the oil, paid for it, and subsequently, in or about October, 1922 (p. 16), *brought suit against the seller in the Massachusetts Superior Court,* alleging breach of quality, and *predicating jurisdiction upon an attachment made by it upon, and limited to the value of, the drums in which the oil was shipped*

to the buyer, and which were then on the *buyer's premises, and in its possession* (p. 16). *This suit,* which was the *"original suit,"* was forthwith removed by the seller to the District Court of the United States, counsel appearing "specially" in its behalf, both in the removal proceedings and in the District Court (p. 16).

In March, 1923, *the seller brought a cross-action in the District Court against the buyer to recover the value of the drums attached in the above-named suit, and for their conversion.* While these suits were pending in the District Court, *the buyer, on January 4, 1927* (p. 16), *brought an action in the District Court,* seeking thereby unrestricted jurisdiction, not limited to the value of the containers (p. 16), and made service upon the seller's counsel in the *cross-action.*

Thereafter, to wit, on February 28, 1927, *the buyer discontinued the original action in the District Court* (pp. 16, 73 bot.).

The seller seasonably pleaded in abatement of the present action, in substance, that service, under the circumstances alleged, did not give to the buyer the right to satisfy a judgment, if any, obtained against any property of the respondent except the containers, but for the presence of which in Massachusetts the buyer would have been obliged to bring its original action in Virginia, and that therefore the service attempted to be made upon the respondent's attorney was void and of no effect (p. 17).

A motion to dismiss based upon this plea in abatement was overruled, and the seller answered over, taking proper steps to protect its rights under its special appearance.

In February, 1928, the two cases were tried together, and the buyer had a verdict of $10,730.17; the seller, in its cross-action, recovered $100, and the jury found, specially, that the *fair value of the drums, on September 15, 1922,* the date when they were attached by the buyer, was $1384 (p. 71). The jury also found, specially, that the detention of the

drums by the purchaser *was an unreasonably long detention* (p. 71).

After the verdicts, on February 14, 1928, the seller filed a motion in arrest of judgment which was overruled, and the seller's exception was saved (p. 72).

The seller's petition for appeal was allowed on January 31, 1929, and on the same date it filed its assignments of errors, nine in number, all of which were relied upon except that numbered 6 (pp. 83-84).

Upon the argument of its appeal the seller prevailed on the merits (Opinion of Anderson, J., pp. 86-89), and thereafter, upon reargument, the Circuit Court of Appeals dismissed the case for want of jurisdiction. The buyer thereupon asked this Court to issue its writ of certiorari to review the judgment of the Court of Appeals, and the request was granted.

The seller calls special attention to the fact that, at the time when the buyer's present action was brought, *its* (the buyer's) *original action was still pending and had not been discontinued* (p. 16). The property (drums) described by the petitioner as of "nominal value" was found by the jury, as heretofore stated, to be worth $1384 (p. 71).

I.

The Law Involved.

The case turns principally upon the construction and applicability of Mass. G.L. c. 227, secs. 2 and 3, which are as follows:

> "Section 2. If an action is brought by a person not an inhabitant of the commonwealth or who cannot be found herein to be served with process, he shall be held to answer to any action brought against him here by the defendant in the former action, if the demands are of such a nature that the judgment or execution in the one case may be set off against the judgment or execution

in the other. If there are several defendants in the original action, each of them may bring such cross action against the original plaintiff and may be allowed to set off his judgment against that which may be recovered against him and his co-defendants in like manner as if the latter judgment had been against him alone.

"Section 3. The writ in such cross-action may be served on the attorney of record for the plaintiff *in the original action* and such service shall be as valid and effectual as if made on the party himself in the commonwealth."

Upon an analysis of these sections, and of the undisputed facts stated in the record, it appears that the "original action" in this case was the suit brought by the buyer against the seller in the Massachusetts Superior Court, alleging breach of quality. This suit was forthwith removed by the seller to the District Court of the United States.

The Massachusetts statute under scrutiny clearly indicates that the legislature did not contemplate permitting a resident-plaintiff to bring a subsequent suit against a nonresident-defendant enlarging the jurisdiction of the resident-plaintiff's original suit, merely because the nonresident choses to bring a cross-action; and section 3 of chapter 227, establishing the method under which the provisions of section 2 can be taken advantage of, clearly demonstrates this to be true, inasmuch as it provides that the writ in such *cross-action* may be served upon the attorney for the plaintiff in the *original* action. In the case at bar the cross-action was that brought by the nonresident, McNeal-Edwards Company, against the resident-plaintiff, F. L. Young Company, and F. L. Young Company's suit brought in 1922 was the "*original action.*"

The petitioner, F. L. Young Company, insists that its suit now pending was the cross-action, and that the *true*

cross-action, brought by McNeal-Edwards Company, is the original action, and in so doing, among other things, is obliged to ignore the fact that the real "original" action (that of 1922, brought by the petitioner) was pending when it brought its present suit. The seller has, from the beginning, contended that this situation disposes of the buyer's contention that service by it upon the respondent's attorney in the cross-action, gave the petitioner general jurisdiction against the person of the respondent. In neither opinion of the Court of Appeals is there any discussion of this phase of the case.

The record discloses a situation which is unusual, if not unique. On the original argument, upon the merits, the court below was unanimously of the opinion, written by Anderson, J. (pp. 86-89), that the seller was entitled to a verdict on the merits, and an order was entered sustaining the seller's appeal. Subsequently a motion for rehearing was presented, and, on the argument thereof (a majority of the court—*Bingham* and *Wilson*, JJ.; *Anderson*, J., dissenting, p. 112), the judgment of the District Court was vacated, the verdict set aside, and the case dismissed for want of jurisdiction, without prejudice, and without costs (p. 82).

This is the first time, it is diffidently submitted, that an attempt has been made by any court, thoroughly to marshal and analyze all the cases bearing upon the jurisdictional question involved in this litigation. That it has been performed with the learned and painstaking discrimination which such an important question justifies is obvious. Respondent's counsel have been unable to discover any other decisions which throw further light upon the issues presented.

It would be presumptuous and futile for counsel to undertake to improve upon the reasoning of the court and the conclusion to which it leads.

II.

Status of Unanimous Opinion of the Court Below upon the Merits which has been "Superseded."

Counsel for the petitioner has seen fit also to discuss the question decided by the court below upon the merits, and it behooves the respondent's counsel, therefore, to endeavor to meet their contention.

The allegation of error to which Judge Anderson's original opinion was directed was based upon the proposition that the failure of the buyer to return the drums was, under the circumstances, a willful breach of the contract on its part; or, in other words, that it was a willful default in a stipulation of the contract, which barred the buyer's right to recover. It is to be emphasized that the contract, as contained in the purchase-order, and in the broker's note for the sale and purchase of the oil, required the buyer to return the drums to the seller with reasonable promptness, freight prepaid. Instead of so doing, the buyer, by its own deliberate act, or, to use the language of the Massachusetts Supreme Court in *Sipley* v. *Stickney*, 193 Mass. 43, 46, "*by its willful default* in the performance of the stipulation of the contract," deliberately planned, rendered itself incapable of compliance with a material obligation, namely, to return the drums (pp. 83-84), and, on the further ground that it was clearly a breach of the buyer's obligation under the contract, which precludes it from recovery, to perform deliberately any act which made it impossible to fulfill that obligation. If this contention is sound, the buyer had no right by its intentional act to cause the drums to be placed *in custodia legis*, that is to say, under attachment, and to claim that it, the buyer, was consequently unable to return them to the seller. In this connection it is to be noted that it is made a part of the record in this case that the buyer in the case of *McNeal-Edwards Company* v. *F. L. Young Company*, tried with this case, found, in answer to a specific

question propounded to the jury by the court, that the retention of the drums, which, at the time of the trial, had never been returned to the seller, was an unreasonable detention (p. 3).

III.

Was the Breach of Contract on the Part of the Buyer Unintentional or Willful?

Whatever the arguments advanced by counsel for the petitioner, they dwell with most emphasis upon the contention, stated in various ways, that, upon all the evidence, the breach by the plaintiff was not willful. It is respectfully submitted that there is not a particle of evidence recited in the record from which the breach could possibly be held to have been anything other than willful.

There is much in the way of elaboration, but little or nothing, as applied to the admitted facts under scrutiny, which is new and fundamental, in the petitioner's brief in support of its contention. The two questions in the petition as to which counsel address themselves anew are, in substance:

(1) Was the breach by the petitioner of the contract in suit willful or unintentional? and—

(2) Which line of decisions, and which of the doctrinal writers—those relied upon by the petitioner or by the respondent (and they are not reconcilable)—should be followed in determining the main issue (though not the basic issue, which is jurisdictional) involved?

No room for doubt exists with respect to the meaning of the word "willful" as used by the courts, and applied to cases such as this. To choose several from a vast number of available authorities:

> " 'Willful' is a word of familiar use in every branch of the law, and although in some branches . . . it may

have a special meaning, it generally implies, as used in courts of law, nothing blameable, but that the person of whose action or default the expression is used, is a free agent, and that what was done arises from the spontaneous action of his will. It amounts to nothing more than this: that he knows what he is doing, and intends to do what he is doing, and is a free agent."

29 Am. & Eng. Encyc. of Law (1st ed.), pp. 113, 114.

" 'Willfully' is a word generally construed to mean intentionally instead of accidentally."

State v. *Prater,* 139 Mo. App. 348.

"Willfully" is a synonymous term with "designedly," without lawful excuse; not accidentally.

O'Barr v. *United States,* 139 Am. St. Rep. 959.

"A willful act is one that is intentional."

Brown v. *B. & M. R.R.,* 73 N.H. 568.

"Willfully" means "intentionally"; that is, that the person doing the act intended at the time to perform the particular act.

State v. *Smith,* 119 Tenn. 521, *et aliunde.*

Applying these definitions to this case, it is perfectly clear that the retention of the drums for several months after they were emptied, and their attachment by the petitioner, was "by design, intentional, and with a set purpose."

IV.

The Buyer's Retention and Subsequent Attachment of the Drums which it had Promised to Return was not only Intentional, but in bad Faith.

It is clear that when litigation became imminent, somebody, at some time between the date when the drums in issue were emptied and September 15, 1922, the date of the writ and attachment, conceived that it was for the interest of the buyer that the drums should not be returned to the seller as promised, but should be retained and attached, thereby vesting the courts in Massachusetts with jurisdiction.

It was a clever and deliberate plan, suggested to, and adopted by, the buyer, at some time between the emptying of the drums and the bringing of the writ, to disregard its obligation to return the drums, and, in lieu thereof, to cause them to be attached, while on its own premises, in judicial proceedings instituted by its counsel in its behalf, in order that it might sue the seller in Massachusetts, and thus avoid the substantial additional expense and annoyance incident to the bringing of its suit in the seller's domicile.

It is plain that a conscientious regard for the obligations of the contract should have prompted the buyer to do what it had promised to do, namely, to return the drums within a reasonable time.

Self-interest, however, persuaded it to ignore its promise, and thereby to avoid litigation in Virginia and to compel the seller to come to Massachusetts to make its defense and enforce its rights. The buyer's act in attaching the drums was clearly premeditated and in bad faith, and its motive was obvious.

To deny recovery to one who has deliberately and purposely, for his own advantage, broken his promise under an explicit agreement, is not hardship, but just retribution. A better illustration of such a situation could hardly be conceived than the act of this petitioner in attaching the drums which it had agreed to return.

Such retention of the drums for several months after they were emptied, and their attachment by the buyer, was clearly not "unintentional," but by design, intentionally, with a set purpose, and in bad faith. It is difficult, and inconsistent with honest dealing, to justify or palliate the act. No authority is cited by counsel for the petitioner, the application of which defends the petitioner's action in this case; and no court, or textwriter, has gone so far as to assert that, in any jurisdiction, an act analogous to that of attaching the drums would, upon the facts disclosed in this case, be held justifiable.

As to the suggestion made by the buyer that it should formally appear in the printed record that the seller's motion for a directed verdict was in fact disallowed, see—

Chateaugay Iron Company, Pet'r, 128 U.S. 544, 553.

United States v. *U.S. Fidelity & Guaranty Co.*, 236 U.S. 512, 529.

Spokane & Inland R.R. v. *Campbell*, 241 U.S. 497, 502.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 490.—October Term, 1930.

Frank L. Young Company, Petitioner, *vs.* McNeal-Edwards Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[May 18, 1931.]

Mr. Justice Holmes delivered the opinion of the Court.

This case presents the question whether under the Conformity Act, U. S. Code, Title 28, § 724, and the Massachusetts statute, Gen. Laws, c. 227, §§ 2, 3, the District Court acquired jurisdiction over the respondent. The Conformity Act provides that "the practice, pleadings, and forms and modes of proceeding in civil causes, . . . in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held." By the Massachusetts Laws, § 2, *Sup.* "If an action is brought by a person not an inhabitant of the commonwealth . . . he shall be held to answer to any action brought against him here by the defendant in the former action, if the demands are of such a nature that the judgment or execution in the one case may be set off against the judgment or execution in the other." By § 3 "The writ in such cross action may be served on the attorney of record for the plaintiff in the original action." In this case the McNeal-Edwards Company, a corporation of Virginia, sold to the Frank L. Young Company of Massachusetts 1107 drums of Menhaden oil; buyers to return the drums. The buyers later sued the Virginia Company for breach of warranty of quality and attached the drums, but the attachment was inadequate security for damages and was the limit of the jurisdiction. Later the Virginia Corporation sued the buyers for the conversion of the drums, and thereupon at a still later date the buyers brought a second suit against the Virginia Corporation for the same cause of action as before, had the writ served upon the attorney of record in the Virginia Corporation's suit, and discontinued its former action. The petitioner in short is plainly within the Massachusetts statute, for al-

though there is some suggestion that by reason of the petitioner's former suit the suit by the Virginia Corporation was not the 'original action' within § 3 supra, we regard this as a mere quibble, and have no doubt that the Massachusetts law applies if the Conformity Act brings it in. The case was dismissed by the Circuit Court of Appeals for want of jurisdiction. 42 F. (2d) 362; 43 F. (2d) 99. A writ of certiorari was granted by this Court.

We have to consider the Massachusetts law so far as it applies to counterclaims arising out of the same contract that was sued upon by the Virginia Company. If there should be any objections to a wider application, they do not affect the respondent and are not open here. *Hatch* v. *Reardon*, 204 U. S. 152, 160. Thus limited the law is only a slight extension of the doctrine of recoupment recognized in Massachusetts apart from statute. *Home Savings Bank* v. *Boston*, 131 Mass. 277, 280. We take it that there is no doubt that the Massachusetts principle would be applied in the Courts of the United States, *Dushane* v. *Benedict*, 120 U. S. 630; and no greater doubt if the principle were established by a code. *Clement* v. *Field*, 147 U. S. 467, 475. *Pacific Express Co.* v. *Malin*, 132 U. S. 531. *Higgins* v. *McCrea*, 116 U. S. 671. Giving the counterclaim the formality of a separate suit hardly is a sufficient reason for refusing to apply the local policy and law. *Arkwright Mills* v. *Aultman & Taylor Machinery Co.*, 128 Fed. Rep. 195, 196. Mr. Langdell observes that there is no necessity for such ceremony in the nature of things "for, the plaintiff being already in court *qua* plaintiff by his own voluntary act, it is reasonable to treat him as being there for all the purposes for which justice to the defendant requires his presence." Langdell, Eq. Pleading, ch. 5, § 119. The characterization of the contrary doctrine as pernicious by Mr. Justice Miller in *Partridge* v. *Phoenix Mutual Ins. Co.*, 15 Wall. 573, is repeated in *Chicago & North Western Ry. Co.* v. *Lindell*, 281 U. S. 14, 17. We see no reason to doubt the constitutionality of the present application of the State law. The policy of it is embodied in equity rule 30. See *Aldrich* v. *Blatchford*, 175 Mass. 369.

The case is within the jurisdiction of the District Court in all other respects if the respondent has been served with process effectively. We are of opinion that the service was good and that the case should not have been dismissed.

Judgment reversed.